A critical consideration of the exclusion of corporate criminal liability for the atrocity crimes under the Rome Statute of the International Criminal Court

by

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DECLARATION

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ABSTRACT

From the international criminal law perspective, unlike the national law perspective, the principle of corporate criminal responsibility is not defined neither does the Rome Statute of the International Criminal Court (ICC) of 1998 provide for it. Therefore, currently, the ICC has no jurisdiction over legal persons. It is the argument of this dissertation that legal persons can commit atrocities. The exclusion of corporate criminal responsibility from the jurisdiction of the ICC undermines the preventative measures that are aimed at putting an end to impunity for atrocity crimes under international criminal law. Further that the exclusion of corporate criminal liability has potential to create unnecessary dissonance between the jurisprudence of the ICC and that of domestic courts.

The premise for advancing the corporate criminal responsibility, among others, includes: *first*, that prosecuting and punishing corporations for international crimes (attributing criminal liability to corporations) would enhance the deterrence theory anticipated by the Rome Statute, thereby supplementing the principle of individual criminal responsibility. *Second*, it is trite law that corporations are at law construed as juristic persons vested with rights and obligations. Therefore, these legal realities, outweighs the corporations' perceived lack of capacity to commit international crimes. *Finally*, evidenced by a series of human rights violations by corporations, there is a watertight case to argue that corporations are capable of being more complicit in the commission of core crimes than is currently assumed.

ABSTRAK

Vanuit die perspektief van die internasionale strafreg, anders as die nasionale regsperspektief, word die beginsel van korporatiewe strafregtelike verantwoordelikheid nie algemeen erken nie, en die Rome Statuut van die Internasionale Strafhof (ISH) van 1998 maak ook nie daarvoor voorsiening nie. Daarom het die ISH tans geen jurisdiksie oor regspersone nie. Hierdie verhandeling argumenteer dat regspersone gruweldade kan pleeg. Die uitsluiting van korporatiewe strafregtelike verantwoordelikheid van die jurisdiksie van die ISH ondermyn die voorkomende maatreëls wat ten doel het om straffeloosheid vir gruwelmisdade onder internasional reg te beëindig. Verder het die uitsluiting van korporatiewe strafregtelike verantwoordelikheid die potensiaal om onnodige onenigheid tussen die regspraak van die ISH en dié van nasionale howe te skep.

Die uitgangspunt vir die bevordering van korporatiewe strafregtelike verantwoordelikheid sluit in, onder andere: *eerstens*, dat die vervolging en strafoplegging van korporasies vir internasionale misdade (die toeskryf van strafregtelike aanspreeklikheid aan korporasies) die vooropgestelde afskrikkingsteorie van die Rome Statuut sal versterk, en sodoende die beginsel van individuele stragregtelike verantwoordelikheid sal aanvul. *Tweedens*, dit is ‘n gevestigde regsbeginsel dat korporasies as regspersone met regte en verpligtinge beskou word. Hierdie regsrealiteite weeg dus swaarder as die vooropstelling dat korporasies nie die vermoeë het om internasionale misdade te pleeg nie. *Ten slotte*, soos bewys deur ‘n reeks menseregteskendings deur korporasies, kan ‘n waterdigte argument uitgemaak word dat korporasies in staat is om meer aandadig aan die pleeg van kernmisdade te wees as wat tans aanvaar word.

DEDICATION

I dedicate this dissertation to the entire Masake family.

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My sincere appreciation goes to Prof. G. Kemp for his invaluable guidance and supervision. Further appreciation is attributed to Prof. Nyathi Sifiso, Dr. Schulz Stefan, Dr. Helao Tuhafeni and Mr Libebe Lizazi for their support.

ABBREVIATIONS

ACJHR:	African Court of Justice and Human Rights
AFRC:	Armed Forces Revolutionary Council
ALC:	Armee de Liberation du Congo
APCP:	All People's Congress Party
ATCA:	Alien Tort Claim Act
AU:	African Union
BC:	Before Christ
BCCI:	Bank Credit and Commerce International
CERA:	Centre for Economic and Social Rights
CEO:	Chief Executive Officer
COE:	Council of Europe
COIDA:	Compensation for Occupational Injury and Diseases Act
CSR:	Corporate Social Responsibility
DRC:	Democratic Republic of Congo
ECOWAS:	Economic Community of West African States
FCPA:	Foreign Corrupt Practices Act
GNPOC:	Greater Nile Petroleum Operating Company
ICC:	International Criminal Court
ICJ:	International Court of Justice
ICL:	International Criminal Law
ICSPCA:	International Convention on Suppression and Punishment of the Crime of Apartheid
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for the Former Yugoslavia
IHL:	International Humanitarian Law

IHRL:	International Human Rights Law
IL:	International Law
IMT:	International Military Tribunal
JCE:	Joint Criminal Enterprise
LURD:	Liberian United for Reconciliation and Democracy
MLC:	Movement de Liberation du Congo
MNC:	Multinational Corporation
MOSOP:	Movement for the Survival of the Ongoni People
NGO:	Non-Governmental Organisation
NMT:	Nuremberg Military Tribunal
NNPC:	Nigerian National Petroleum Company
OAU:	Organisation of African Union
OECD:	Organisation for Economic Cooperation and Development
OTC:	Oriental Timber Company
PIL:	Public International Law
RDPC:	Royal Dutch Petroleum Company
RPF:	Rwandan Patriotic Force
RSA:	Republic of South Africa
RTC:	Royal Timber Company
RTLM:	Radio Television Libre des Mille Collines
RUF:	Revolutionary United Front
SA:	Sturmabteilungen der Nationalsozialistischen Deutschen Arbeiterpartei
SCSL:	Special Court for Sierra Leone
SD:	Sicherheitsdienst des Reichsführer
SERAC:	Social and Economic Rights Action Centre
SFRY:	Socialist Federal Republic of Yugoslavia

SLORC:	State Law and Order Restoration Council
SPDC:	Shell Petroleum Development Corporation
SS:	Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei
STTC:	Shell Transport and Trading Company
TNC:	Transnational Corporation
UK:	United Kingdom
UN:	United Nations
UNCTOC:	United Nations Convention against Transnational Organised Crime
UNGC:	United Nations Global Compact
UNSC:	United Nations Security Council
UNUDHR:	United Nations Charter and the Universal Declaration of Human Rights
USA:	United States of America

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Chapter 1

Introduction and the legal framework of the study

1 1 Orientation of the study

There is a plethora of academic literature on corporate atrocity crimes.[1] The conceptual meaning of atrocity refers to extreme cruelty, barbaric acts that committed on large scale or in a systematic manner, i.e. mass killing and extermination to mention a few. In this dissertation, atrocity crimes[2] refer to the following categories of crimes: genocide, war crimes and crimes against humanity.[3]

Notwithstanding corporate complicit in atrocity crimes, a coherent, systematic and feasible criminalisation and enforcement regime at the international level is still lacking. This is the starting point and basic assumption underlying this study. To introduce the basic problem, let us take as an example of the recent reports on the Canadian company SNC-Lavalin's crucial role in bankrolling the Gadhafi-regime in Libya;[4] a regime alleged to have committed atrocity crimes, *inter alia*, "crime against humanity and war crimes."[5] The situation in Libya was bad enough for the UN Security Council to refer[6] it to the ICC.[7]

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[1] Bush JA "The Prehistory of corporations and conspiracy in International Criminal Law: What Nuremberg Really Said" (2009) *109 Colombia Law Review* 1094-1262; Catargiu M "The origin of criminal liability of legal persons – A comparative perspective" (2013) 3 *International Journal of Judicial Sciences* 26-30; Cavanaugh N "Corporate Criminal Liability: An Assessment of Models of Fault – UK" 75(5) *Journal of Criminal Law* (2011) 414-440.

[2] It is important from the outset to explain that the dissertation is not concerned with defining what atrocity crimes are, nor the elements of atrocity crimes – but on disjoint caused by exclusion of corporate criminal liability from the purview of the ICC and the international criminal law imperative of putting an end to impunity for atrocity crimes – particularly: the impunity which is *de facto* and or *de jure* enjoyed by corporations.

[3] Art 5(a)(b) and (c) of the Rome Statute of the International Criminal Court.

[4] Mark Kersten "Companies helped sustain the Gaddafi regime: They should be held to account" *Justice in Conflict*, (8 April 2019) <https://justiceinconflict.org/2019/04/08/companies-helped-sustain-the-gaddafi-regime-they-should-be-held-to-account/> (accessed 9 April 2019).

[5] See, Kersten (2019) *Justice in Conflict.*

[6] S/RES/1970 (2011) <https://www.icc-cpi.int/nr/rdonlyres/081a9013-b03d-4859-9d61-5d0b0f2f5efa/0/1970eng.pdf> (accessed 9 April 2019).

[7] For an overview, see <https://www.icc-cpi.int/libya> (accessed 9 April 2019).

Several individuals were subsequently indicted for crimes against humanity and war crimes. The arrest warrant against Muammar Gadhafi, the former leader of Libya, was withdrawn due to his death, and the other cases also largely collapsed due to legal and factual reasons that will not be explored here. Suffice to note that while the ICC has jurisdiction to try individuals (natural persons) for the most serious crimes under international law, it does not have jurisdiction over juristic persons (corporations and companies). The ICC also does not have jurisdiction over states (only over individual leaders). The ICC's inability to try corporate entities for the commission of or complicity to atrocity crimes is the topic of this dissertation.

1 2 Research question

Does the exclusion of corporate criminal responsibility from the jurisdiction of the ICC cause a counterproductive disconnect between international criminal law, primarily via the Rome Statute, and domestic criminal law – a disconnect which, in turn, could exacerbate the perceived culture of impunity associated with the commission of atrocity crimes?

1 3 Research rationale, relevance and objectives

This dissertation contributes to international criminal law studies by defining and delimiting the legal requirements and elements of an envisaged corporate criminal responsibility regime under the ICC. The working assumption is therefore that there should be a legal regime at the *international* level to hold corporations responsible for their contribution to atrocity crimes. It further provides a substantive and procedural criminal law framework for corporate criminal responsibility for the purposes of the Rome Statute of the ICC. This is because as a primary objective, the dissertation identifies and discusses the elements that are needed and the requirements that should be met for purposes of holding corporations criminally responsible under the Rome Statute and at the ICC.

The secondary objective of the dissertation is to propose less dissonance and more positive complementarity[8] between the ICC and domestic legal systems with regard to the issue of corporate criminal liability for atrocity crimes under international law. It is important to state that the efforts related to the proposal of less dissonance and more positive complementarity between domestic legal systems and the ICC is not done in isolation or by strictly analysing the binary of domestic law, on the one hand, and on the other hand, the Rome Statute of the ICC. Rather, it includes a broader and more diversified view of a possible corporate criminal responsibility regime for atrocity crimes.

It further includes analyses of the possible disruption or fragmentation created by regional mechanisms such the Malabo Protocol of the African Union (which is not in operation yet) and relevant perspectives from the European Union. Therefore, in order to attain the two core objective, the following components of the research project are identified: *Firstly*, the dissertation demonstrates that prosecuting and punishing corporations for international crimes (attributing criminal liability to corporations) enhances the deterrence theory considered by the Rome Statute, thereby supplementing the principle of individual criminal responsibility. Conversely, the dissertation demonstrates that in terms of the Rome Statute, the failure of the ICC to expressly hold corporations criminally responsible has the potential to exacerbate the perpetration of atrocities by corporations. It is therefore argued that subjecting corporations to a criminal regime under international criminal law, particularly through the instrumentality of the Rome Statute, would help to put an end to impunity for crimes perpetrated by corporations and other organised structures.

[8] Paragraph 10 of the Preamble of the Rome Statute of the ICC, which provides that "(…) International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." See also Art 1 of the Rome Statute, which provides for the following: "An International Criminal Court ('the Court') is hereby established. (...) and shall be complementary to national criminal jurisdictions."; X Philippe "The Principles of Universal Jurisdiction and Complementarity: How do the Two Principle Intermesh?" (2006) 88 *IRRC* 375 380, explains that "the principle of complementarity is a functional principle that is aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primacy jurisdiction." In a nutshell, this principle is largely function as a middle ground between state sovereignty and the universal jurisdiction principle of the ICC. It also functions as a concrete means of implementing the Rome Statute by domestic courts.

The assumption is clear: Upholding the theory that corporations cannot commit criminal activities amounts to turning a blind eye to reality[9] and negates an effective mechanism for suppressing any criminal activities perpetrated by corporations.[10] In essence, the dissertation advocates for the Rome Statute to be amended in order to accommodate corporate criminal responsibility alongside the principle of individual criminal liability and to allow the ICC to be entrusted with jurisdiction over legal persons. The benefits of such inclusion include the following: (i) it effectuates the legitimisation of the domestic prosecution of corporations which, in turn, improves the complementarity principle; (ii) it ensures predictability in international criminal law; (iii) it has great potential for creating uniformity in the attribution of criminal accountability to companies; and (iv) it effectively closes the loopholes caused by the failure to prosecute corporations.[11]

Secondly, the dissertation demonstrates that upon incorporation, corporations acquire rights and obligations,[12] which include the right to sue and be sued, the right to acquire property in the corporation's name and to dispose of the same, and the right to conduct business for the benefit of the corporation. It is settled law that upon incorporation a company (corporation) acquires a separate legal personality from its members;[13] therefore, given

[9] DM Amann "Capital punishment: Corporate criminal liability for gross violations of human rights (Holding multinational corporations responsible under international law)" (2001) 24(3) *HICLR* 327 331.

[10] See, *New York Central & Hudson River R.R. v U.S.* 212 U.S. 481 (1909) 495 in which the court held that "the law cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and giving them immunity from all punishment because of the old principle that corporations cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at".

[11] PH Bucy "Corporate criminal liability: When does it make sense?" (2009) 46(4) *ACLR* 1437 1437.

[12] *Lee v Lee's Air Farming* [1961] AC 12; S Goulding *Principles of Company Law* (1996) 40 argues that "[o]nce registered in a manner required by law, a company forms a new legal entity separate from the shareholders, even where there is only a bare compliance with the provisions of the Act and where the overwhelming majority of the issued shares are held by one person."

[13] *Salomon v Salomon & Co* Ltd [1897] AC 22; *Macaura v Northern Assurance Co Ltd* [1925] AC 619.

these legal realities, it is submitted that corporations' perceived lack of capacity[14] to commit international crimes should be challenged.[15]

Thirdly, the dissertation demonstrates that there is substance to the argument that corporations are capable of being more complicit in the commission of core crimes than is currently assumed. Core crimes may be committed in different ways, including commission by omission. Goodin posits that "[t]he actors' failure to discharge responsibility for different tasks and their *ex ante* duties to ensure that certain harms do not happen"[16] may indeed qualify as a mechanism that has merit in attributing criminal liability to corporations. Therefore, it is inevitable that corporations' complicity should be scrutinised.

Fourthly, the dissertation illustrates that in order to effectively deter corporations from committing gross human rights abuses, and core crimes in particular; the ICC must introduce criminal sanctions against corporations. It is worth to note that at present, criminal sanctions against corporations are the subject of much debate. Scholars argue that the use of civil sanctions and administrative fines is not very effective, especially "where the cost of harm exceeds the damages that are likely to be imposed on the corporation".[17] In contrast, the stigma associated with the imposition of criminal sanctions may very well help to bridge the

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[14] PL Davies *Gower and Davies' Principles of Modern Company Law* 8 ed (2008) 153 posits that the concept of capacity when applied in the context of companies can be traced back to the 19th century when the concept of a 'company's legal capacity' was developed by the courts; more specifically, the company's capacity to act was limited by its objects. The practice was that a company was required by legislation to include a statement of its objects in its memorandum of association; hence, companies were not allowed to act outside their objects.

[15] JW Ehrlich *Ehrlich's Blackstone* (1959) 106 – the Blackstone theory states that "a corporation cannot commit treason or felony or other crime in its corporate capacity, though its members may in their distinct individual capacities". The approach that corporations cannot commit crimes should be challenged. Among the reasons for challenging this approach are obvious, including that the characteristics of present-day corporations no longer resemble those of the guilds whose functions were to control the rights to engage in business and that corporations could not engage in any business activities except through their members. Modern corporations have rights and duties, the capacity to acquire and dispose of property, and the right to sue and be sued in the corporation's name; TJ Bernard "The historical development of corporate criminal liability" (1984) 22(1) *Criminology* 3 4; J Kyriakakis "Prosecuting Corporations for International Crimes: The Role for Domestic Criminal Law" in L May & Z Hoskins *International Criminal Law and Philosophy* (2010) 118.

[16] RE Goodin "Apportioning Responsibility" (1987) 6 *Law and Philosophy* 181 183; SL Seck "Collective Responsibility and transnational corporate conduct" in T Isaacs & R Vernon (eds) *Accountability for collective wrongdoing* (2011) 148.

[17] VS Khanna "Corporate Criminal Liability: What Purpose Does It Serve?" (1996) 109(7) *Harvard Law Review* 1477 1479.

gap between expectations of justice, on the one hand, and the reality of what is perhaps perceived to be a "slap on the wrist" if there are not serious reputational consequences for the corporate entity involved in the relevant atrocity, on the other hand. Hence, it is argued and indeed, recommended, that the ICC should introduce appropriate criminal sanctions (in conjunction with criminal liability) against corporations for atrocity crimes committed by them.

Fifthly, the dissertation demonstrates and recommend that apart from the strict liability and vicarious liability modes, there are other feasible modes that may be applied in the process of attributing criminal liability to corporations, including "co-perpetration, joint criminal enterprise and aiding and abetting."[18] The latter mode of responsibility contemplates bringing justice to remote participants or offenders who may not be present physically at the crime scene but whose role may be crucial to the successful commission of the crime.

Finally, the dissertation demonstrates that the primacy jurisdiction and the complementarity principle contemplated in the Rome Statute mandate state parties to implement the Rome Statute.[19] Domestic courts, pursuant to bringing an end to the impunity enjoyed by corporations, may try and punish such corporations for international crimes. However, there must be national laws in place that proscribe corporate criminal activities. Relevant reform of the Rome Statute legal regime may contribute to domestic law reform, which, in turn, will help to close the impunity gap with respect to corporations in the context of atrocity crimes.[20]

1 4 Research methodology

The dissertation adopted a qualitative study approach – with object to obtain in-depth data on the exclusion of corporate criminal responsibility from the purview of the ICC. For

[18] These are some of the principles that may perfectly apply to corporations.
[19] Art 1 of the Rome Statute of the ICC.
[20] Kyriakakis "Prosecuting Corporations" in *Law and Philosophy* 117; Bernard (1984) *Criminology* 3; G Mueller "*Mens Rea* and Corporation" (1957) 19 *University of Pittsburgh Law Review* 21 21.

this reason, the conclusions made in the dissertation were not arrived at by means of quantification or any mathematical computation.

A desktop data collection method was used which included a review of secondary legal data and literature without undertaking field work. The desktop research activities included, search for materials related to the topic in libraries and electronic libraries databases; conducted searches through internet sources, specifically, google scholar search engine; blogs as well as print and web-based media handles.

The secondary data mainly included information obtained from published physical books and electronic books, electronic peer viewed journals, media reports and reports from the United Nations website. The information obtained was subsequently synthesised by drawing parallels or comparison (comparative study) between national jurisprudence, regional perspectives, and the jurisprudence of the ICC, thereby providing conclusions and theoretical results. The secondary sources, which help to inform the theoretical framework of the dissertation, were supplemented by an in-depth scrutiny of relevant secondary data sources (treaties, constitutions, legislations, common law, and customary international law) and the jurisprudence from national and international courts and tribunals.

The study did not involve any form of fieldwork or field surveys. Thus, it was purely a desktop-based research and was construed as a low risk form of study and was as such cleared in terms of the institutional rules that governs research ethical clearance.

1 5 Limitation of study and demarcation of the issues

The dissertation is constructed and premised on theoretical underpinning, in contrast to empirical observations or experiments that may lead to conclusions that can be verified through empirical testing. The choice of “core crimes” which form part of the focus of this study needs to be briefly explained and justified. There is an elegant Latin maxim that encapsulates the problem: *Expressio unius est exclusio alterius*. Essentially, it means to

include is to exclude. The inclusion/exclusion here refers to the list of crimes that would qualify as international/atrocity/core crimes. There is some debate about terminology in academic circles. Terms like "international crimes", "crimes under international law", "atrocity crimes" and "core crimes" refer to different things.

There are also important overlaps. The approach adopted in this dissertation is the one followed by Werle and Jessberger. They recognise that certain crimes, like piracy, terrorism and drug trafficking, are "crimes of international concern (and are as such criminalised under treaty law and/or customary international law)."[21] The proposition that these "international crimes" attract direct criminal accountability at international law level, is contested. A smaller group of "[c]rimes, namely genocide, war crimes, crimes against humanity, and the crime of aggression, involve direct individual responsibility under international law."[22] These are also known as the "core crimes" and "are the most serious crimes of concern to the international community".[23] From the potential list of "international crimes" (which would include treaty crimes such as terrorism, drug trafficking and human trafficking) it is only the core crimes that are provided for in the Rome Statute of the ICC.

The ICC – the "*first permanent international criminal court*" - is an imperfect institution (to say the least) but the working assumption underlying this dissertation is that the ICC is still the best available international (and potentially global) vehicle to end impunity for the atrocity crimes. Hence, the choice to use the Rome Statute as a basic framework of analysis for purposes of this dissertation. This choice would imply that the topic of corporate criminal responsibility should then be considered with reference to all the crimes under the Rome Statute, namely genocide, crimes against humanity, war crimes and the crime of aggression. For purposes of possible corporate criminal responsibility as a mode of liability for atrocity crimes a further distinction and demarcation is necessary. Three of the crimes (or, to be

[21] G Werle & F Jessberger *Principles of International Criminal Law* 3ed (2014) 31.
[22] Werle & Jessberger *International Criminal Law* 31.
[23] Werle & Jessberger *International Criminal Law* 32.

more precise, *groups* of crimes) namely war crimes, crimes against humanity and genocide, have one element in common: they all involve severe violations of human rights. Kai Ambos puts it as follows:

> "[These] can be regarded as the decision norms (*Sanktionsnormen*) concerning severe violations of human rights as their conduct norms (*Verhaltensnormen*)."[24]

The fourth core crime – the crime of aggression – has one very prominent feature that sets it apart, namely its characterisation as a leadership crime *par excellence*. Moreover, this leadership feature refers by definition to a person "in a position effectively to exercise control over or to direct the political or military action of a State."[25] The crime of aggression therefore falls in a class of its own, even though it also forms part of the class of "core crimes" included in the jurisdiction of the Rome Statute of the ICC. This dissertation's focus is not on the elements of crimes. The focus is on of models of responsibility – with specific emphasis on corporate criminal responsibility. The title of this dissertation therefore contains the demarcating reference to "atrocity crimes" in order to limit the focus to the three core crimes that are not per definition political and military leadership crimes, but that could also (theoretically) be committed by actors other than natural persons (of whatever rank or position).

1 6 Contextualisation of the problem statement

There is currently no harmonisation between the practice of domestic courts and that of the ICC regarding criminal accountability of corporations. The technical reason is obvious: The Rome Statute excludes corporate criminal responsibility from the jurisdiction of the ICC – by not making a provision for corporate criminal responsibility in the text of the Rome Statute. In contradistinction, domestic legislations (laws) in several states makes provision

[24] K Ambos "International economic criminal law" (2018) *Criminal Law Forum* 499 501.
[25] Art 8*bis*(1) Rome Statute of the ICC; G Kemp *Individual Criminal Liability for the International Crime of Aggression* 2ed (2016) 180.

for corporate criminal responsibility,[26]but the ICC does not recognise this concept. The lack of recognition of this concept by the ICC is problematic in the sense that it creates a disjointed legal regime on responsibility for atrocity crimes – between the domestic and international law.

The debate on criminal responsibility of body corporates under the ICC has a history.[27] In 1998, the Rome Conference had an opportunity to deliberate on a request or proposal of whether to include corporate criminal responsibility in the purview of the ICC. Accordingly, Draft Article 23(5) of the Rome Statute sought to provide for corporate criminal responsibility scheme. However, this proposal did not succeed because some states objected to its inclusion. The grounds for this objection included concerns that the principle of corporate criminal responsibility was not practiced in some states, which raised "[q]uestions of how various national penal systems would accommodate it".[28] The Rome Conference did not exhaust this comparative law challenge; as a result, the principle of corporate criminal liability was not included in the final text of the Rome Statute.

The inception of the ICC in 2002 was without doubt a historic achievement in international criminal law and in the sphere of public international law. Among others, the object of the ICC is to put an end to impunity for those responsible for committing international core crimes. More than a decade has passed since the ICC has commenced its operations, yet juristic persons are still excluded from its jurisdiction, even though there was a Review Conference in 2010 where states party to the Rome Statute had the opportunity to amend the Rome Statute.

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[26] See, for instance, sect 332 of the Criminal Procedure Act 51 of 1977 South Africa. See also sect 332 of the Criminal Procedure Act 51 of 1977 Namibia; Arts 121-122 of the French Penal Code; Art 5 of the Belgian Penal Code as amended by the Belgium Law of May 4, 1999; Art 51 of the Dutch Penal Code (Netherlands); the United States of America; Canada; Denmark (amended its Penal Code in 2002 to accommodate corporate criminal liability); CN Nana "Corporate criminal liability in South Africa: A need to look beyond vicarious liability" (2011) 55(1) *JAL* 86 89; EB Diskant "Comparative corporate criminal liability: Exploring the uniquely American doctrine through comparative criminal procedure" (2008) 118(1) *YLJ* 127 128.

[27] A Voiculescu "Human rights and the new corporate accountability: Learning from recent developments in corporate criminal liability" (2009) 87(2) *JBE* 419 420.

[28] A Clapham *Human Rights Obligations of non-state actors* (2006) 246.

It is worth noting that there is a plethora of literature citing concrete examples of corporations having been thought to be involved in or having been implicated in grave violations of human rights,[29]some of which are sometimes "considered criminally wrongful."[30] For instance, among others, the participation (complicit) of Kangura radio in the crime of genocide in Rwanda.[31] Kangura radio was active in making announcements which directed the Tutsi who were in hiding to go to certain alleged designated rescue points (places where they could be rescued by police officials). The Tutsi, who were in hiding, followed the directions as per the announcements with hope to be rescued. Upon their arrival at the said designated points they found themselves surrounded, captured and killed by the Hutus. In this case the Kangura radio played an essential role of deceiving the Tutsi by promising them rescue. This, case is discussed in detail in chapter 4 below.

However, suffices to argue that despite the implication of corporations in serious human rights abuses (constituting crimes such as torture, forced labour, rape and so forth),[32]there is still no forum at international criminal law, including the ICC, that has the jurisdiction to bring these corporations to justice. In other words, it would seem that for the last decade, despite advances made in terms of bringing an end to impunity for individuals, including heads of state, accused of crimes under international law, corporations have enjoyed both *de facto* and *de jure* impunity for these crimes, at least in terms of the first permanent ICC.[33]

Situations that demonstrate corporations' complicity in international crimes include incidents such as Unocal, Talisman Energy, Anvil Mining (DRC) and Lundin Oil AB, to mention but a few. These concrete situations are fully analysed in chapter 3 below.

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[29] JW Harlow "Corporate criminal liability for homicide: A statutory framework" (2011) 61(1) *DLR* 123; MJ Kelly "Grafting the command responsibility doctrine onto corporate criminal liability for atrocities (A worldwide response: An examination of international law frameworks in the aftermath of national disasters)" (2010) *EILR* 24(2) 671 672.

[30] Seck "Collective Responsibility" in *Accountability* 5; Kyriakakis "Prosecuting Corporations" in *Law and Philosophy* 108.

[31] See, detailed discussion in chapter 4 of this dissertation.

[32] Clapham *Human Rights Obligations* 252.

[33] WC Wanless "Corporate liability for international crimes under Canada's crime against humanity and war crime" (2009) 7 *JICJ* 201 202.

1 7 Theorising about the problem associated with corporate criminal liability

The exclusion of the principle of corporate criminal responsibility from the text of the Rome Statute and from the jurisdiction of the ICC presents two major challenges. In the first place, the exclusion undermines the object of the ICC of thwarting impunity for those responsible for atrocities, in the sense that atrocities committed by corporations at international level go without punishment. Contrast to atrocities committed by natural persons. Of course, other collectives and abstract entities, *inter alia*, states are also not included within the ICC's, but the "[c]onduct of states can be adjudicated before *other* international *fora*, notably the International Court of Justice (ICJ)."[34]

Secondly, the exclusion creates discord between the jurisprudence of the ICC and that of domestic courts. Among the root causes for the exclusion of corporate criminal liability from the jurisdiction of the ICC is the objection by civil law states based on the principle of *societas delinquere non potest*. Apart from this objection, the other cause is partly rooted in the fact that the drafters of the Rome Statute failed to appreciate the consequences of *organisation theory* and the dynamics of corporations in attributing criminal liability.

Max Weber describes a corporation as an institution that is systematically organised and whose functions are linked in a hierarchical order.[35]Thus, Weber's description of an ideal corporation entails a firm that has goals, a hierarchy of offices (structure), policies and rules. The legal implications of corporate rules and policies include that the behaviour of an individual employee is limited. McGuire states that "an individual employed by a corporation is conceived as a means to an end".[36] In a nutshell, the crux of *organisation theory* entails that a corporation is a functional unit or institution that musters its human and capital resources towards the full realisation of its corporate objectives and goals. These corporate

[34] *Croatia v Serbia* ICJ para 140 Judgment delivered on 3 February 2015 on the application of the Convention on the Prevention and Punishment of the Crime of Genocide.
[35] M Weber *The Theory of Social and Economic Organisation* Translated by AM Henderson & T Parsons, edited by T Parsons (1946) 71; H H Gerth & C Wright Mills *From Max Weber: Essays in Sociology* (1946) 20.
[36] JW McGuire *Theories of Business Behaviour* (1964) 31.

objectives are often not identical to the interests of the individual employees who are employed by such a corporation.[37]

Larry May extends Max Weber's organisation theory and describes a corporation as "[a] conglomerate that has internal decision-making procedures".[38] In this manner, corporations function according to established procedures and not according to the whims and caprices of the employees; hence, these sets of corporate procedures, policies and practices may be evidence of corporate intention.[39]In *HL Bolton (Engineering) Ltd v TJ Graham & Sons Ltd*,[40] Denning held that:

> "A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such."[41]

It is therefore submitted that although corporations are abstract entities without a mind of their own or a tangible physical body, as Haldane in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*[42] held, "their directing mind and will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation."[43]

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[37] McGuire *Theories* 29.
[38] L May "Collective Punishment and Mass Confinement" in T Isaacs & R Parson *Accountability for Collective Wrongdoing* (2011) 169 170.
[39] May "Collective Punishment" in *Accountability* 171.
[40] [1957] 1 QB 159.
[41] Para 172.
[42] [1915] AC 705 713.
[43] Para 713.

The development of business corporations and their recognition as legal persons mean that corporations are not regarded merely as an aggregate of persons; rather, they are conglomerates with internal control measures and mechanisms. These internal mechanisms include, among others, corporations' capacity to make and implement decisions.[44] It is commonplace that these corporate decisions and practices are in many jurisdictions construed as constituting a true reflection of the "corporate knowledge, aims, objects or intentions",[45] unless the contrary is proven. These decisions are often made for the benefit of the corporations as opposed to that of the individual members (including directors).

Resolutions passed or decisions taken and implemented by corporations may have adverse effects on human rights that may reach the threshold of atrocity crimes. Under these circumstances, it is worth noting that it is unfair and unreasonable to reduce or attribute such decisions to an individual member(s) to the exclusion of the corporation itself without prejudicing the individual (natural person).[46] This is because, but for the business benefit that accrued to the corporation(s), the individual member(s) could not by his/her own volition have participated in the decision-making process. Therefore, this indicates the corporate mind in contrast to the individual member(s)' intentions and without doubt requires, as Wells puts it, "a special kind of intentionality, namely 'corporate policy'".[47]

It is submitted that the complexity of corporations and the technicalities related to corporate decision-making make it difficult for the principle of corporate criminal responsibility to be sufficiently appreciated. Now, it is relevant to note a number of decision-making models that may help us to understand corporate organisational behaviour. Such an understanding can help to shape arguments when debating whether to hold corporations criminally liable or not.

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[44] Goulding *Principles* 47.
[45] Seck "Collective Responsibility" in *Accountability* 146.
[46] H van der Wilt "Corporate criminal responsibility for international crimes: Exploring the possibilities" (2013) 12(1) *CJIL* 43 48.
[47] C Wells *Corporations and Criminal Responsibility* 2 ed (2001) 79-80.

There are three business decision-making models that have been identified as being relevant to the question of whether to hold corporations criminally responsibility or not. The first is the *rational actor model*. This model holds that "corporations are unitary rational decision makers"[48]with the effect that the decisions taken within the corporation are solely for and in the interests of the corporation (maximising corporate value) in contrast to the interests of the individual member(s).[49]The proponents of this model argue that to impose criminal sanctions for wrongful conduct flowing from this model on an individual member is unfair and prejudicial to the individual member because no pleasure or benefits accrued to or were enjoyed by the individual member. Therefore, to effectively deter criminal activities committed under this model, sanctions should be imposed against corporations.

The second model is the *organisational process model*, which considers corporations to be akin to a "[c]onstellation of loosely allied independent decision making bodies or units"[50] that are regulated by a set of standardised procedures. The assumption under this model is that liability should be assumed with regard to individuals who are in a position to enact (in a managerial position) the criminogenic set of procedures, to the exclusion of members of lower ranking.

The third model is the *bureaucratic politics model*. This model presupposes that individuals use the legal personality of corporations for their own private interests, which are distinct from those of the corporations.[51] In essence, in such cases corporations may be used as an instrument for committing crimes, for example to finance terrorism and aid and abet atrocities. The proponents of this model argue that when corporations commit crimes, such corporations may be declared as criminal organisations. Moreover, despite this

[48] B Fisse & J Braithwaite *Corporations Crime and Accountability* (1993) 102.
[49] N Cavanaugh "Corporate criminal liability: An assessment of models of fault in UK" (2011) 75(5) *JCL* 414 415.
[50] Fisse & Braithwaite *Corporations* 102.
[51] Fisse *&* Braithwaite *Corporations* 103.

declaration the courts should proceed in "piercing the corporate veil"[52] to ensure that the authors of these atrocities who are hiding behind the corporate veil are held individually criminal liable.

In *Foss v Harbottle*[53]*,* the famous English precedent*,* the court found that a company may institute a suit against any person – here, a body corporate has *locus standi* to sue in its capacity as plaintiff in the proceedings, in contrast to its members. It is on this premise, as it is argued in this dissertation, that where a body corporate commits an offence – the corporation itself should be liable. In essence, the view here, is that corporate criminal responsibility and individual criminal liability both strongly advance the object of putting an end to impunity. Therefore, they stand in a complementary position to each other in the process of social control and should not be construed as a mutually exclusive means of social control.

1 8 An overview of the substantive chapters

The dissertation consists of seven substantive chapters. *Chapter 1:* The foundational chapter contains the research question, the rationale and the methodology that inform the research and presentation thereof in the various chapters of the dissertation. Chapter1 also contains some definitional and foundational discussions, including an elucidation and discussion of the concepts of corporation and corporate criminal responsibility. It explains the rationale, the relevance of undertaking the study and state the contribution that the study will make to the legal literature. The chapter places the problem statement informing the research in its proper context. In addition, the chapter also explores the contours of the challenges associated with the criminal responsibility for body corporates for atrocity crimes

[52] Declaring an organisation a criminal organisation has far-reaching consequences because all those associated or affiliated with such an organisation may be deemed to have had knowledge that such an organisation is indeed a criminal organisation. This may adversely affect those who are/were innocently associated with that organisation. Hence, piercing the corporate veil helps to identify the real culprits and to exonerate innocent members.

[53] (1843) 67 ER 189.

under both the jurisdiction of the ICC and domestic jurisdictions. The object, being to lay the foundation for the in-depth analyses of the various doctrinal and policy issues addressed in the subsequent chapters.

Chapter 2: The origins and historical development of the principle of corporate criminal liability: An analysis from selected domestic jurisprudence. The chapter firstly analyses the origin and historical evolution of the principle of corporate criminal liability. Secondly, it expound on the principle of legal personality (concept of juristic person) and how legal personality influences corporate capacity. Further, it demonstrates that corporations have, among others, the capacity to act, to sue and to be sued for wrongful conduct, to acquire property and to dispose of such property, and further that these rights impose corresponding obligations. Thirdly, it includes a discussion on the inclusion and exclusion of the principle of corporate criminal liability at domestic level. For this purpose, selected jurisdictions are analysed, notably South Africa (SA), Namibia, the United Kingdom (UK), Sweden and the United States of America (USA), that recognise criminal responsibility of body corporates; and civil law states, such as Germany, Italy and France, which recognise varying forms of corporate criminal and/or administrative liability.

Chapter 3: The principle of corporate criminal liability and the international criminal tribunals: The unfinished business from Nuremberg to The Hague and beyond. This chapter analyses the practice and the legacy of the Nuremberg trials, including the trials under the Control Council Law, and other international criminal tribunals, such as the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTR), The Extraordinary Chambers in the Courts of Cambodia and the jurisprudence of the Special Courts for Sierra Leone. Further, it discusses the theories behind the withdrawal of Draft Article 23(5) from the Rome Statute. There is profound dissonance between the ICC and domestic courts concerning corporate criminal liability.

Chapter 4: Corporations and human rights violations. The chapter analyses illustrative incidences of body corporates and human rights infringement. The analysis is narrowed down to then focus specifically on systemic violations that would amount to crimes under international law (the atrocity crimes). It is shown that there are various ways in which corporations may commit, conspire, or to "aid and abet the commission of atrocity crimes."[54] The discussion in this chapter include the analysis of important cases such as the *Unocal* case, the *Talisman Energy* case, the *Anvil Mining (DRC)* case, the *Shell Nigeria* case and the *Lundin Oil AB* case. The essence of the chapter is to provide evidence and to demonstrate that body corporates can commit crimes at the systemic or atrocity level.

Chapter 5: Forms of criminal responsibility: Attribution to corporations of *actus reus* and *mens rea* for international crimes. Firstly, this chapter analyses two important approaches that are relevant in the process of imputing *actus reus* and attribution of *mens rea* on the corporation, *inter alia*: the nominalist approach on one end, and on the other end, the realist approach. The nominalist (derivative) approach encompasses principles such as command responsibility, senior management test, aggregation, and vicarious liability as modes through which criminal responsibility may attach on body corporates. In contrast to the nominalist approach is the realist approach that contemplates to hold body corporates criminally responsible for atrocities by means of invoking "corporate culture and structural negligence."[55] Secondly, the chapter contrasts rules of corporate criminal responsibility with the modes of liability currently available at the ICC, which excludes the modes of responsibility of body corporates explored in this chapter.

Chapter 6: Prosecution and punishment: Exploring how corporations may be criminally sanctioned under the jurisdiction of the International Criminal Court for international crimes. To unpack the contents of this chapter, firstly it discusses the theories of punishment,

[54] See, detailed discussion on how corporation may be complicity in the commission of atrocity crimes in chapter 4 of this dissertation.
[55] These are new principles that anticipate holding body corporates responsible.

including retribution, rehabilitation and deterrence. These are analysed within the framework of criminal responsibility of body corporates. It further acknowledges the fact that corporations are excluded from the jurisdiction of the ICC and therefore corporations cannot be prosecuted and punished by the ICC for international crimes. Given this proposition, this chapter surveys the possibilities of prosecuting corporations for atrocity crimes and analyse the nature of punishment that may be appropriate for corporations, including, among others, criminal fines, declaring corporations as criminal organisations, adverse publication and compulsory deregistration of corporations. *Chapter 7*: Submissions and conclusions. This chapter contains the main conclusions and submissions.

1 9 A brief primer on a key concept: What is a corporation?

The definitions of the entities known as “corporations” and “companies” are contentious and is far from being settled as it is demonstrated below. The purpose of providing a discussion on these concepts is multifaceted. It is important to illustrate the conceptual nexus between the corporation and corporate criminal responsibility. Further, to show to that body corporates possess features (legal personality, company as a system, corporate culture) from which their capacity to act may be inferred from – including the capacity to commit crimes.

In literature, (referencing mostly the broad corporate tradition influenced by English and US law) there seems to be a theoretical distinction between “companies” and “corporations.” The terminological distinction includes the proposition that ownership of a company is vested in its members. By contrast, shareholders own corporations.[56] Further, members manages the company, whereas, executives and officers of the corporation are responsible for its management subject to the board of directors’ oversight. Thus, the effect of this distinction is that a corporation may possess the characteristics of a company; in contrast, a company

[56] S J Skripak “Forms of business ownership” (2016) 120 <http://hdl.handle.net/10919/70961> accessed (2019/02/28).

is not capable of possessing characteristics which are unique to a corporation.[57] Implicitly, the concept of corporation has a wider scope than the word company. It is submitted that for purposes of this dissertation, the distinction between the two concepts is recognized, but the dissertation will use both terms. The reasons being that practically, both companies and corporations are creatures of the law (statutes, for the most part, but historically also under common law[58]). Both are conferred with legal personality distinct from their founders and that they may be formed for gain or not for gain. It should also be noted here that these observations are fairly generalising and with reference to the main national jurisdictions that feature in this dissertation. It follows that reference to the word company, unless otherwise specifically stated, means corporation and *vice versa*.[59]

The origins of the entities that later became "companies" and "corporations" under English law can be traced back to the English borough and gild merchant. Although corporations existed in some form in the ancient world (Greece and Rome),[60] it is doubtful that modern English law found inspiration in these ancient constructs. The true foundations of the modern English corporation and company are the abovementioned borough and gild, and by extension, the foreign trading companies which extended their operations from the craft guilds in the early 1500's.[61] A detailed discussion on guilds is undertaken in Chapter 2 below. For purposes of this chapter, it suffices to state that at domestic level modern companies may be classified as private or public companies.[62] Despite this classification, the definition

[57] Skripak "Forms of business ownership" (2016) 120.
[58] J Grant *The Law of Corporations* (1854) 18 (cited in L W Hein "The British business company: Its origins and its control" 15 *U Toronto LJ* 134 (1963) 134.
[59] Y Zhang "Corporate criminal responsibility in China: Legislations and its deficiency" (2012) 3 *Beijing Law Review*, 103 -108 at 103 defines corporations interchangeably with organisations as "meaning any kind of entities, groups especially those in private sectors which are organised loosely, whereas the term of unit includes not only any companies, enterprises, institutions and organisations, but also some entities in public sector, such as the state organ which is the organ of state authorities or administrations.
[60] S Williston "History of the Law of Business Corporations before 1800" 2 *Harvard Law Rev* 117 (1888) 108.
[61] L W Hein "The British business company: Its origins and its control" (1963) 135-136.
[62] Chapter 3 Part 1 of the Namibian Companies Act 28 of 2004.

of the term company caters for both the private and public companies. The (South African) Companies Act[63], defines a company with reference to:

> "a juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that immediately before the effective date-
> (a) was registered in terms of the
> (i) Companies Act, 1973 (Act No. 61 of 1973), other than as an external company as defined in that Act; or
> (ii) Close Corporation Act, 1984 (Act No. 69 of 1984) if it has subsequently been converted in terms of schedule 2;
> (b) was in existence and recognized as an existing company in terms of the Companies Act, 1973 (Act No. 61 of 1973); or
> (c) was deregistered in terms of the Companies Act 1973 (Act No. 61 0f 1973) and has subsequently been re-registered in terms of this Act."[64]

From the definition above, it is apparent that for an association of people or conduct of business to be construed as a company, it must be incorporated or registered in the country of origin. Further that upon registration, the company becomes a juristic person. Finally, organisations that are recognized as companies may either be of domestic or external (international) origins. The statutory connotation of company as provided above does not depict all the features of what a company is, as it only identifies certain features such as incorporation and legal personality of companies. On the face of the statutory definition, key features such as association of people, contributions, and intangibility, are not readily provided.

Thus, to bring to the fore a definition that depicts salient features of what a company is, resort may be had to jurisprudence and scholarly works. Davies describes a company as "an association of a number of people for some common object or objects."[65] It follows from

[63] Act 71 of 2008 of South Africa.
[64] Section 1 of Namibian Companies Act 28 of 2004 provides that "a company incorporated under Chapter 4 of this Act and includes any body which, immediately before the commencement of this Act, was a company in terms of the repealed Act." This definition includes companies registered or incorporated outside the Namibian territory.
[65] Davies *Company law* 4.

Davies' description of company that the meaning of common object(s) may include forming a company for purpose of carrying out business to gain profit or not for profit.[66] Wardell defines a corporation in an extended manner to include not only the association of persons for a common goal as defined by Davies, but rather "as an association of individual people created by law, and it exist independent of the existence of its members, and powers and liability distinct from those of its members."[67] Zinnecker describes a corporation as an "[i]maginary being without a mind but the mind of its servants, it has no voice but the voice of its servants, and it has no hands with which to act but the hands of its servants".[68]

There is agreement, at least in theory, by scholars that the definitions of corporation provided above might well extend with necessary amendments to include multinational corporations or transnational corporations (TNCs).[69] This suggestion is premised, among others, on the following elements: first, both domestic corporations and TNCs have countries of origin or countries where they were founded and registered and are juristic persons. Second, TNCs, just like domestic corporations, are associations of persons for a common goal and they exist independently of their founders or owners. The necessary amendments to the definition of corporation above are required to fully cover the TNCs. These amendments are found in the operational characteristics of the TNCs. On this score, Hobson posits that TNCs "are business entities that have operations critical to their prosperity in two or more countries."[70] The enhanced mobility of TNCs over countries' borders has been

[66] Section 21 of the Namibian Companies Act 28 of 2004 provides for creation of companies formed for promotion of religion, arts, recreation, and charity.
[67] N N Wardell "The Corporation" (1978) 107(1) *Daedalus* 97 97.
[68] T R. Zinnecker "Corporate vicarious liability for punitive damages" *Brigham Young University Law Review* (1985) 317 320.
[69] M Kordos & S Vojtovic "Transnational corporations in the global world economic environment" (2016) 230 *Procedia – Social and Behavioral Sciences*, 150-158 at 151 who posits that "even if these companies are developing the international activities, by their nature they are a national company."
[70] I R Hobson "The unseen world of transnational corporations' powers" (2006) 1 *Neumann Business Review*, 23 23.

accredited to free market systems and internationalisation of business – which are hallmarks of 21st century globalisation.[71]

The other aspect identifiable from the operations and governance of TNCs is that they command strong influence on states, especially (but not exclusively) states with poor democracies and governance systems. Hobson argues that this influence is a reality "[d]ue to the concentration of market power – for instance, TNCs have achieved and demonstrated the ability to influence the direction of political and economic policies both on a national and international level."[72] With this enormous power and influence, TNCs, as Rondinelli argues, are capable of operating beyond or in contravention of national laws and in the manner that may negatively affect the rights of citizens, including commission of crimes.[73]

Derived from these definitions and analyses, the following corporate features which are relevant to the discussion on corporate criminal responsibility are identified, namely: incorporation, legal entity, capacity to prosecute or defend a legal suit in corporate name, and corporate culture. These identified features are briefly discussed below. It should be noted that these features are contextualised with reference to some of the domestic legal systems that feature in this dissertation. These are mostly from the Anglo-American legal culture, and South African and Namibian law feature prominently for illustrative purposes.

1 9 1 Incorporation

Incorporation refers to the registration of a company in the register of companies and "upon registration a certificate of registration or incorporation is issued."[74] The issuance of the certificate of registration signifies the birth of the company. Important to note that prior to the registration of a company there are rigorous processes that take place, among others,

[71] Kordos *et al* (2016) *PSBS* 150 151.
[72] Hobson (2016) 1 *NBR* 23 23.
[73] D A Rondenelli "Transnational corporations: International citizens or new sovereigns?" (2003) 107(4) *BSR* 391-413 at 395.
[74] D French, S Mayson & C Ryan *Company law* 24th Ed (2008) New York: Oxford University Press, 3; Section 70 of the Namibian Companies Act 20 of 2004.

there is a duty on the registrar of companies to ensure that the business (object) of the company to be registered is lawful. If the object of the company is illegal – such a company may not be registered.[75]

Incorporation is significant to the discussion on corporate criminal responsibility, because of its undertone, that is, it implies that a company is registered for a lawful purpose. This fact obviates and pre-empts any critical inquiry on criminal responsibility of juristic persons (corporates). The reason is technical – that is, it can create a perception within the broader public that corporations are incapable of committing crimes because their objects of incorporation are to conduct lawful business. Therefore, if a wrongful conduct was committed, it ought to be construed as unintended. Further analysis, on this subject, is made in chapter 5 below.

1 9 2 Legal personality

It is common knowledge that upon incorporation a corporation becomes a juristic person (artificial person) with its own legal personality separate from its founders, promoters and shareholders.[76] Lord MacNaghten in *Salamon v Salamon and Co Ltd*[77] stated that "the company is at law a different person from its subscribers."[78] Legal personality refers to the recognition or status afforded to the corporation by the law. The legal nature of legal personality, among others, is that a company is conferred with requisite rights and corresponding obligations.[79] A company exist separately from its owners. The legal entity status of the company impacts the principle of corporate criminal responsibility. The corporate legal personality, particularly the separate existence of companies, is not immune from abuse and as such, it may be used as a shield by criminals to evade justice by invoking

[75] French et al *Company law* 44.
[76] Davies *Company law* 33.
[77] 1897 AC 22.
[78] *Salamon* at 51.
[79] M Kremnitzer "A possible case for imposing criminal liability on corporation in international criminal law" (2010) 8 *JICJ* 909 911.

the protection provided by the corporate veil. Of course, the corporate veil may, under certain special circumstances, be pierced by courts.[80]

However, piercing the corporate veil is not an ordinary relief and, as such, courts are often reluctant to invoke it.[81] In *Adams v Cape Industries plc*[82] it was found that the right to use a corporate structure was inherent in corporate law, as such courts are not entitled to readily pierce the veil of incorporation – this was stated as follows:

> "We do not accept as a matter of law that the court is entitled to lift the corporate veil (…) merely because the corporate structure has been used so as to ensure that the legal liability in respect of a particular future activities of a group will fall on another member of the group rather than the defendant company."[83]

By explication, it is apparent that because of the corporate legal personality and strict rules that govern piercing the veil of incorporation – individuals who abuse the corporate veil may enjoy impunity for crimes committed.

1 9 3 Capacity to sue and be sued in corporate name

There is a dominant view within the Anglo-American tradition that corporations have the right to bring and/ or defend a legal suit in their names.[84] This right may be exercised both in civil and criminal proceedings. States afford corporations the right to sue and obligation to be sued because they are recognized as juristic persons and as such are construed as subjects of domestic laws. Domestic courts, in an innovative manner, have begun adjudicating over issues to determine whether body corporates can be held to account for contravening the principles of international law. However, at international level, corporations

[80] *Smith v Hancock* [1894] 2 Ch 377; *Firestone Tyre and Rubber Co Ltd v Lewellin* [1957] 1 WLR 464.
[81] *Nedco Ltd v Clark* (1973) 43 DLR (3d) 714 at 721 the court emphasised that the separate personality of a corporation may be lifted if there are compelling reasons to do so.
[82] [1990] Ch 433.
[83] *Adams* at 544.
[84] Davies *Company Law* 41.

are not recognized as subjects for purposes of legal actions – this is despite the fact that they enjoy certain limited rights.[85] The non-recognition of corporations as subjects at international level negatively affects the application of the principle of corporate criminal responsibility, an issue which is at the heart of this dissertation.

1 9 4 Corporate culture

The concept of corporate culture refers to how the corporation hold itself in the society and it is not limited to corporate policies, management dynamics, and practices. Burchell posits that corporate culture is "founded in the outward manifestation of the policy and practices of the corporation."[86] In order to invoke corporate culture scheme in the context of criminal law, the inquirer should examine whether the conduct of a corporate agent is dictated by a corporate policy. If it is established that such conduct was in compliance with a particular corporate policy – then the corporation ought to be held criminally responsible.

1 9 5 Complex nature of corporations

Corporations can be structured in a less complicated or more complex manner. Pickering observes that the complexity of corporations renders it difficult to exactly pinpoint who must carry the blame for corporate wrongful conduct[87] - for instance where a corporation has subsidiaries and where a sublet of a subsidiary committed the wrongful conduct. The challenge, from the perspective of the victim and, by extension the prosecutor, is whether to proceed against the sublet-subsidiary or the subsidiary or the parent corporation.[88]

The issue of establishing who ought to take the blame under the principle of corporate criminal responsibility has led to a comparative law challenge. The challenge is evidenced

[85] J E Alvarez "Are corporations subject of International Law?" (2011) 1 *Santa Clara Journal of International Law* 1 – 36.
[86] J Burchell *South African Criminal Law and Procedure 4th Ed*. (2011) 474.
[87] M A Pickering "The company as a separate legal entity" (1968) 31(5) *Modern Law Review*, 481 -511 at 481.
[88] French et al *Company Law* 126.

by the inconsistencies observed in states when applying the principle of corporate criminal responsibility. As is discussed in detail in Chapter 2 of this dissertation, some states apply theories such as vicarious liability, piercing of corporate veil, identification, aggregation or corporate culture theory to establish the guilt of offenders. The lack of a unified applicable theory adds to and deepens dissonance between domestic and international legal development towards holding corporate entities responsible for atrocity crimes.

1 10 A brief primer on the notion of corporate criminal responsibility

To regulate the conduct of corporations, a state may opt to impose civil, criminal or administrative sanctions or a combination of these sanctions. Therefore, the principle of corporate criminal liability forms part of the broader scheme of corporate responsibility. The definition of corporate criminal responsibility is contentious and as such is far from being settled.

Farisani defines corporate criminal responsibility with reference to "finding a corporation criminally liable for crimes it has committed or for crimes that have been committed in endeavouring to pursue the interests of the corporation."[89] It is common knowledge that a body corporate does not have hands and mind of its own to actually commit a crime – thus, when Farisani in her definition makes reference to *crimes it has committed*, implicitly it means the offences committed by the agents of the company. This suggestion is supported by Burchell who argues that "[t]he principle of corporate criminal liability purports to impute onto a corporation, crimes – conduct and fault of individuals – committed by the director, employee or agent of a corporation."[90]

On the issue of imputation of conduct, as is discussed in detail in chapter 2, 5 and 6 respectively below, there are jurisdictional facts that must be satisfied before a director or

[89] D M Farisani "Corporate criminal liability in South Africa: What does history tell us about the reverse onus provision?" (2017) 23 (1) *Fundamina*, 1 3.
[90] Burchell *Criminal Law* 473.

employee's conduct may be imputed on the corporation. These factors include, among others, the determination whether the agent, employee or director committed the crime whilst in the performance or furtherance of the corporation's interests.

Gruner describes corporate criminal liability as "a device that encourages corporate managers to ensure that the corporate activities they initiate and oversee are conducted within lawful bounds and with due regard for public interest."[91] According to Fisse and Braithwaite, corporate criminal liability presupposes that companies can commit offences – thus, they ought to account. Further that accountability here should be through criminal responsibility.[92]

In a nutshell, the principle of corporate criminal responsibility is construed as a principle that is parallel to corporate civil liability and it complements the principle of individual criminal liability.[93] It is important to note that several theories underpins the principle of corporate criminal liability scheme, namely: vicarious liability, identification and aggregation, and corporate culture or organisational model theory. In practice, as it is demonstrated in chapters 2 and 6 respectively below, corporate criminal liability may encompass three modes, namely, direct, indirect and administrative sanctions.

1 10 1 Direct form of corporate criminal responsibility

Under the direct model, the object is to punish the offending corporation directly for the crimes committed – without first finding a director or agent or representative of such offending corporation guilty. The basis for this direct mode of corporate scheme may be found on assumption and utility of corporate culture and policy theories. Corporate culture

[91] R Gruner *Corporate Criminal Liability and Prevention* (2005) 1-4.

[92] Fisse et al *Corporations* 19. Fisse et al contend that "[m]any features of corporations are observable, such as assets, factories and decision-making procedures while many features of individuals are not, such as personality, intention, and unconscious mind."

[93] Kemp G, Walker S, Palmer R, Baqwa D, Gevers C, Leslie B & Steynberg A *Criminal Law in South Africa* (2012) 215 proffer that unlike corporate criminal liability, "individual criminal liability is the cornerstone of criminal law and it presupposes that a person who commits a crime is generally, and with a number of exceptions, held criminally responsible for his or her deeds."

theory presupposes that a corporation's criminal liability should be construed from its policies, rather than from the fault of its employees, agents or directors.[94]

This model is relatively new, and it has not received wide acceptance. Much of the discussion on this model is provided in chapters 2, 5 and 6 below. However, suffice to state that there are compelling suggestions on the relevance and application of this model, among others: firstly, corporations, unlike natural persons are recognized as juristic persons with limited capacities. Thus, there is a suggestion that corporations should not be equated with individuals. Rather – when corporate criminal conduct is considered a suitable – an analogy between corporate and human activity must be searched.[95]

In relation to the search of an analogy, Burchell posits that corporate policies may be comparable to *mens rea* of a natural person. Further, the failure on the part of the corporation to devise and use or apply strategies to avert harmful conduct may be "seen as reactive fault on the part of the corporation."[96] Therefore, the corporation's guilt may be established referencing its failure, if such failure does not satisfy the standard required of reasonable behaviour in terms of the settled negligent test.[97]

1 10 2 Indirect (derivative) form of corporate criminal responsibility

The indirect model seeks to punish corporations by means of first obtaining a guilty finding against a director and or representative of such corporation. The indirect mode is theoretically premised on vicarious liability, aggregation and identification theory – a full discussion on these principles is provided in chapter 2 below. The choice for the state to reject or adopt both or either of the two models of corporate criminal liability may be informed by such state's legal history, political aspirations, social and economic developments.

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[94] L Jordaan "New perspectives on the criminal liability of corporate bodies" (2003) 1 *Acta Juridica* 48 51.
[95] Burchell *Criminal Law* 472.
[96] Burchell *Criminal Law* 472.
[97] Jordaan (2003) *Act Juridica* 48 71.

1 10 3 Administrative sanctions

Administrative sanction is a form of punishment that is imposed when conduct regarded as an administrative offence is committed. For instance, in Russia the Code of Administrative Offences of 2001 defines an administrative offence with reference to a "wrongful, guilty action of a natural person or legal entity which is administratively punishable."[98] Since that definition sounds somewhat circular and self-referential, a more generic approach may be more useful. Thus, for administrative penalties to be levied, it ought to be proved that a corporation had an opportunity to observe the violation of the rules and norms. Further that notwithstanding such observation, the corporation did not take necessary steps to avert the contravention of the said rules and norms.[99]

It follows that administrative offences are generally committed through negligence – that is, a corporation must have foreseen the harm and opted to tolerate or treat such harm in an unreasonable manner. Despite the existence of negligence in this scenario, scholars tend to classify administrative offences as non-criminal. This suggestion is premised on the assumption that corporations are "incapable of taking autonomous decisions"[100] and are therefore morally blameless and their conduct (albeit "negligent") should not attract criminal sanctions that would be appropriate in the case of moral blameworthy human beings.[101]

It is not the aim here to make general statements about whether there is a movement away from criminal liability and towards administrative liability for corporate misconduct. Such a statement would require careful and nuanced national surveys. But anecdotally one can point to national examples where the application of criminal law in administrative proceedings favours a different classification from the present non-criminal classification. A

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[98] Article 2.1.1 of The Code of Administrative Offences of the Russian Federation 195-FZ of December 2001 adopted on 21 December 2001 and endorsed by the Council of Federation on 26 December 2001.
[99] Article 2.1.2.
[100] S Kuhn "Corporate criminal liability in Germany?" (2014) *Simmons & Simmons elexica*, 1 1.
[101] M Bose "Corporate criminal liability in Germany" (2011) in M Pieth & R Ivory (eds) *Corporate Criminal Liability. Ius Gentium: Comparative Perspectives on Law and Justice, Vol 9*, 227-254.

notable example is Germany, a jurisdiction often associated with an aversion for corporate criminal liability. However, even the German system, with its apparent preference for administrative rather than criminal sanctions for corporate wrongdoing, provides in the Criminal Code[102] (sections 73 and 74) for forfeiture and confiscation of proceeds of unlawful activities acquired by companies, the kind of sanction that is more punitive than it is purely administrative in nature.

Reliance on criminal law principles as noted above, support a suggestion that the administrative sanctions are quasi civil and criminal[103], and certainly not devoid of the rationales and nomenclature associated with criminal liability. In sum, suffice to state that the primary object of administrative liability as well as both the direct and indirect model of corporate criminal liability is to thwart impunity for the violations committed by corporations. And, it is the quest to end impunity for harmful corporate behaviour that is the golden thread running through this dissertation.

1 11 Corporate criminal liability and the Rome Statute of the ICC: An overview

The overview on corporate criminal liability is provided here, notwithstanding an elaborate analysis thereof in chapters 2 and 3 below. The object is to enhance and provide a contextualised perspective of the statement of the problem provided below. Therefore, in a concise manner, suffice to state that the principle of corporate criminal liability is not defined nor is it provided for in the Rome Statute of the ICC of 1998.[104] The rationale for its exclusion from the ICC's jurisdiction, as is discussed and analysed in detail in chapter 3 below, is a subject of much debate. As noted elsewhere in this dissertation, currently the ICC has no

[102] The German Criminal Code promulgated on 13 November 1998, Federal Law Gazette p3322.

[103] R Kriksciunas & S Matuliene "Practice of Establishment of Evidence in Cases of Administrative offences" (2011) 1(22) *Socialiniai tyrimai* / *Social Research*, 25 26.

[104] The text of the Rome Statute was circulated as document A/CONF.183/9 of 17 July 1998 and corrected by *procès-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002; the Rome Statute came into force on 1 July 2002.

jurisdiction to prosecute and punish juristic persons.[105]There are arguments that the "application of the definition of many crimes, is restricted through having evil intent as an element thereof."[106] Because of this limitation, individual criminal liability is treated and ordained as the backbone of criminal responsibility, to the exclusion of others forms responsibility.[107]

With this foundation, the dissertation advances argument, as demonstrated in subsequent chapters below, that the exclusion of corporate criminal liability from the jurisdiction of the ICC undermines the preventative measures that are aimed at "putting an end to impunity for the most serious crimes under international law."[108] Further, it is submitted that the exclusion of corporate criminal liability also creates unnecessary dissonance between the jurisprudence of the ICC and that of domestic courts. The non-recognition of corporate criminal liability is critically analysed from a distinct international criminal law perspective that is informed by the imperative to bring an end to impunity for atrocity crimes under international law, namely genocide, war crimes and crimes against humanity.

[105] Art 25 of the Rome Statute of the ICC provides for individual criminal liability as opposed to corporate criminal liability; N Farrell "Attributing criminal liability to corporate actors: Some lessons from the International Tribunal" (2010) 8(3) *JICJ* 873 875.

[106] E J Chesney "Concept of Mens Rea in the Criminal Law" (1939) 29(5) *Journal of Criminal Law and Criminology* 627 -630.

[107] F P Lee "Corporate criminal liability" (1928) *Vol 28(1) Colombia Law Review* 1 2.; Kemp et al *Criminal Law* 215.

[108] Putting an end to impunity for atrocity crimes is one of the foundational basis for this dissertation.

Chapter 2

The origins and historical development of the principle of corporate criminal liability: an analysis from selected domestic jurisprudence

2 1 Introduction

The concepts of *corporation* and *corporate criminal responsibility* were briefly explored in chapter 1 of this dissertation. In this chapter, focus is not on a redefinition of the notion of corporate criminal responsibility; rather, it is on the doctrinal origins and development thereof. To attain this object, *firstly*: the chapter explores the principle of legal personality; how legal personality influences corporate capacity and its relation to criminal responsibility of body corporates.

Secondly the chapter analyses the origins and historical evolution of the principle of corporate criminal liability at domestic level. For this purpose, selected jurisdictions are analysed, including common law (or mixed) jurisdictions, such as SA, Namibia, the UK, the USA and Sweden and civil law states,[109] such as Germany, Italy and France. *Finally*, a summary of the discussion is made.

2 2 The correlation between corporate separate legal personality and corporate criminal liability

The argument in favour of prosecuting and punishing corporations for their conduct that are deemed to be criminal including “crimes against humanity, war crimes and genocide” may be explained by the distinct legal nature and the effects of the principle of legal personality of corporations. As we know, the concept of legal personality when applied in the context of law of corporations (company law) refers to a legal status that is conferred on

[109] M Mohamed “Corporate criminal liability: Article 10 of the Convention against Transnational Organised Crime” (2012) 66(1) *JIA* 107 109.

a corporation by law.[110] It is therefore important to elucidate the salient characteristics of the concept of separate legal personality, its relevance and legal consequences thereof in the setting of corporate criminal responsibility. It is common knowledge that corporations, unlike human beings, lack any physical mass which can be confined or a soul that can be subjected to condemnation, however, a corporation is at law recognized to subsist as a separate person from its founders or promoters.[111]

At the onset, it is important to set the legal history that underpins legal personality of body corporates. In the present, the Roman Dutch law with the influence of the English common law constitutes the SA and the Namibian common law.[112] The precepts of the classic Roman

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[110] Goulding *Company Law* 39.

[111] Bernard (1984) Criminology 4 argue that "[f]or practical reasons, the legal fiction developed, in Europe that various nonhuman entities would also be considered persons before the law. Further that among the early examples of this legal fiction concerned the question of who owned the church property. In addressing this question, the courts accepted that the property of the church was not necessarily owned by landowner or the clergy but by the church itself or the on-going group of people who constituted the congregation and who, for legal purposes, were to be treated as a single person." *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 550; *Macaura v Northern Assurance Co Ltd* [1925] AC 619 (HL(Ir)); *Gutman v Standard General Insurance Co Ltd* 1981 (4) SA 114 (C); *Dhlomo v Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (A) at 952 Rabie ACJ stated " (…) the recognition of the right of a trading corporation to sue for defamation involves an extension of the principles of Roman and Roman Dutch Law which dealt with the right of action only in relation to natural person (…)"; *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A).

[112] J Dugard *International Law* 4th ed (2011) 15; Nana (2011) 55 (1) *JAL* 86 posit that "the Roman Law of corporations formed the basis of Roman Dutch law, given that Dutch institutional legal commenters and practitioners of the 16th, 17th,and 18th centuries used Roman law as the foundation of their private law. It was this system that was initially exported to South Africa by Dutch settlers who had come to colonize this part of Africa. Thus, the law of Holland as it was in the year 1652 became the bedrock of the modern South African law when it was instituted in the Cape of Good Hope". According to PH Masake "A critical analysis of the implementation of the Rome Statute of the International Criminal Court: A Namibian perspective" (2014) LLM Thesis, *Stellenbosch University*, 15 stated that "[N]amibia as it is known today was formerly called South West Africa. It was annexed as a German colony in 1884. Later South West Africa came to be a Protectorate of South Africa under the precepts of the Treaty of Versailles and the South West Africa Mandate, Act 49 of 1919 which was signed on 28 June 1919, reprinted in Government Notice 72 of June 1921. This Act ensured that the administration of the territory of South West Africa was delegated to the Governor General of South Africa. Subsequently, the Administration of Justice Proclamation 21 of 1919 was promulgated which transferred all laws, including criminal laws which were applicable in South Africa, to be applied in the territory of South West Africa".; S K Amoo & S L Harring "Namibian Land: Law, Land Reform, and the Restructuring of Post-apartheid Namibia" (2009) Vol 9 *University of Botswana Law Journal* 87 89 states that there is "[a] plethora of literature which confirms that the common law which was brought by Jan van Riebeeck when he settled at the Cape of Good Hope traces its origin to Roman Dutch law, which is currently perceived as the common law of Holland. This common law was developed in South African courts and was also made applicable in the territory of South West Africa". In *Binga v Administrator General, South West Africa and Others* 1984(3) SA 949 at 972 C-E the court confirmed that: "The common law in this territory is still the Roman-Dutch law which is the common law of the Republic of South Africa. (…) a great part of our statute law originated in the Republic or was South African statute law which was made applicable to the territory. It further follows that our statute law is to be

law, two categories of artificial entities were recognized as legal persons, *albeit*, with limited capacity and these included the "*universitas personarum"* and the "*universitas bonorum*."[113]

In essence, "these artificial entities were comprised of natural persons who could nominate one of their members or any natural person to act on their behalf".[114] Despite the limited capacity of these artificial entities and the fact that their existence and functions were strictly dependent on the permission from the state, "their right to sue in their corporate capacity and obligation to pay compensation when requested by courts were recognized".[115] The recognition of corporations' separate legal personality status by the law entails that corporations "have the capacity to acquire legal rights and incur corresponding legal duties."[116]

In contradistinction, a human being has distinctive characteristics including physical existence and a mind that may be capable of appreciating an act and acting in accordance with own free will and the ability to contrast right and wrong or good and evil.[117]The essence or consequences of conferring a corporation with the legal personality status is multifaceted including but not limited to benefits or rights such as limited liability, perpetual succession, acquisition and disposal of properties, profit making, capacity to sue and be sued in the corporation's name and capacity to conclude legally binding contracts.[118] These economic benefits are not limited to domestic companies; rather they equally apply to multinational and or transnationally operating corporations.

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interpreted against the background of our common law which is, as stated above, the same as that of the Republic of South Africa."

[113] See, Nana (2011) 55(1) JAL 87 who defines *universitas personarum* as "[a]n association of persons and included municipalities, various religious bodies, certain trade unions and associations of financers whereas the *universitas bonorum* refers to a complex set of assets and liabilities, including charitable foundations such as hospitals alms-houses".

[114] Nana (2011) *JAL* 104.

[115] Nana (2011) *JAL* 87.

[116] FHI Cassim, MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law 2ed* (2012) 31.

[117] Burchell *Criminal Law* 332.

[118] Cassim *et al Contemporary Company law* 35 – 40.

Therefore, upon incorporation a corporation is legally accepted or deemed to be person who can be distinguished from the founders and as such became a bearer of rights and obligations. The instructive matter on this legal position is the *Salomon v Salomon and Co Ltd*[119] in which the court held that:

> "It seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are."[120]

Further that the actions or decisions made in the furtherance of a corporation's business interests by an agent or employee of the juristic person (corporation) are at law recognized as the acts or decisions of such a juristic person.[121] The recognition of corporations as juristic persons and bearer of rights and corresponding obligations are entrenched in domestic legislation and even in foundational and constitutional law. The 1996 South African Constitution recognizes this position and provides that: "a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."[122]Recognition of corporations to have full capacity to act, including to sue and be sued, to be bearer of rights and obligation can further be construed in terms of the Namibian Companies Act which provides that:

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[119] [1897] AC 22 (HL).

[120] *Salomon* at para 30.

[121] See, *Vane v Yiannopoullos* [1965] AC 486 at 504 "(…) that in the absence of proof of actual knowledge, nevertheless the licencee or proprietor may be liable if he be shown (…) effectively to have delegated his proprietary or managerial functions."

[122] Section 8(4) of the 1996 Constitution of the Republic of South Africa; Article 5 of the Namibian Constitution provides that "the fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed".; Section 19(1)(a) and (b) of the Companies Act 71 of 2008 of South Africa; *Dadoo* at 550 "[a] registered company is a legal persona distinct from the members who compose it (…). This conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance, property vested in the company is not, and cannot be regarded as vested in all or any of its members."

"Subject to this section a company has the capacity and powers of a natural person of full capacity in so far as a juristic person is capable of having that capacity or of exercising those powers."[123]

In terms of the principle of separate legal personality Kemp *et el* observed that: "flowing from this is the practical reality that juristic persons can act, and their actions have consequences in real life. Unfortunately, these consequences are sometimes criminal in nature".[124] These practical realities need to be recognized not only by domestic legal systems or courts as is the practice at present but should in the same vein be recognized at the international level, as is argued in this dissertation.

As expounded above, the principle of separate legal personality plays a vital role in imputing criminal liability on corporations. For instance, there are high prospects of succeeding with a charge against a corporation based on vicarious liability principle if such "[a] body corporate is recognized at law as a legal person (juristic person)."[125] In contrast, there are low prospects for a charge against a corporation to succeed based on vicarious liability in circumstances where such a corporation is not incorporated as such.[126] This is because of the difficult in proving master-agent relationship, without which the requirements of in "course of employment" may not be established. The failure by the prosecution to prove this requirement may render a charge not successful. The relationship between the principle of separate legal personality and corporate criminal liability is of great importance when contemplating to hold corporations liable for the perpetration of crimes, and, as will be shown, the core international crimes.

[123] Section 38 (1) of the Namibian Companies Act, Act 28 of 2004.
[124] Kemp *et el Criminal Law*, 215.
[125] This is because body corporate are the captains of economies, unlike individual human beings.
[126] The reasons for lesser prospect of succeeding against unregistered corporation include among other things the challenge of establishing the legal existence of the master (corporation) for purposes of proving the master-agent relationship and the determination of the scope of employment element.

2 3 Historical development of corporate criminal liability

There is a plethora of academic literature and court decisions that support a contention that prior to the inception and recognition of the principle of corporate criminal liability, corporations were deemed incapable of committing any offence.[127] The early criminal law theories of punishment were premised on individual criminal liability, thus, criminal responsibility was limited to offences that were committed by natural persons.[128] The origins and development of the principle of corporate criminal liability is a subject of much debate and was strongly influenced by the type of a legal system. For instance, in common law legal systems, the origins can be traced to the common law doctrine of vicarious liability.[129]This can be contrasted with civil law legal system in which it developed at a slower pace because they upheld the *societas delinquere non potest* principle. Thus, the conception, contours and expansion of the principle of corporate criminal liability can be distinguished (different) from one legal system to another. The notable contradistinction is apparent, *inter alia*, amid the civil law[130] legal system on one hand, and on the other hand, the common law legal systems.[131] In the discussion that follows, a comparative analysis in regards to the origins and doctrinal development of corporate criminal responsibility is made with specific reference to common and civil law legal systems.

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[127] *R v Oudtshoorn Municipality* (1908) 25 SC 257 at 261; Bernard "The historical development of corporate criminal liability" 4; E Burchell, P Hunt, J Milton and J Burchell *South African Criminal Law and Procedure General Principles of Criminal Law vol 1* (1983) 395.

[128] This legal position is still practiced at present by some of the states that adopted the civil law legal system.

[129] Bernard (1984) *Criminology* 3; Seck "Collective Responsibility" in *Accountability* 143.The vicarious liability doctrine entails that a principal (corporation) may be held liable based on the transactions of an agent or employee if such agent or employee acted within the actual scope of authority, including if such transactions were ratified.

[130] Civil law legal systems require that all the laws must be 'completely written and codified' and the judges are expected to interpret and apply it without reference to decided cases.

[131] The common law legal system is often known as the Anglo-American tradition of common law. Under this legal system, according to Bernard (1984) *Criminology* 13 "Common law, through most of its history, was not written or codified, and judges were expected to make substantive interpretations and advances from established common law positions."

2 3 1 Development and inclusion of corporate criminal liability in common law/ mixed jurisdiction legal systems

Literature suggests that the corporate criminal liability scheme developed in common law jurisdictions. However, there are observations, *inter alia*, that, its inception is tainted with obscurity[132] and it was not conceived by legislative will, rather it was developed by courts. Interestingly, the development was premised on yet another obscurely founded principle of derivative scheme, namely: vicarious liability. Bernard summarises the early development of the corporate criminal liability principle stating that:

> "The application of criminal liability to corporations grew out of a minor common law doctrine that masters were criminally liable if their servants who created a public nuisance by throwing something out of the house onto the street. The expansion of that doctrine to full corporate criminal liability was primarily the result of judicial interpretation of common law and existing statutory laws, rather than the result of any deliberate legislative action."[133]

Deduced from the summary above, it is apparent that vicarious liability as practiced in common law states influenced, to a great extent, the development of the principle of corporate criminal liability.[134]In brief, the principle of vicarious liability refers to the "liability of one legal person, be it natural or juristic person, for the acts of another."[135]The conception of the principle of vicarious liability is obscure and lies directly in opposition or sharp contrast to the principle of individual criminal liability[136]and it was not conceived by any legislative

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[132] Mueller (1957) *Uni Pitts Law Rev* 21 argues that "[n]obody bred the principle of corporate criminal liability, nobody cultivated it, nobody planted it, rather it just grew"; Bernard (1984) *Criminology* 3 opined that "[t]he concept of corporate criminal liability developed in the Anglo-American tradition of common law from small and obscure beginnings in the process of accretion that lacked any conscious or overall directions."

[133] Bernard (1984) *Criminology* 4.

[134] Bernard (1984) *Criminology* 5; S Park & J Song "Corporate Criminal Liability" (2013) *Vol 50 American Criminal Law Review*, 729 731.

[135] C Elliott & F Quinn *Criminal Law Sixth edition* (2006) 303.

[136] Elliott *et el Criminal Law* 9 asserts that it is generally accepted at law that for "[a]n accused to be found guilty of an offence, such an accused must not only have behaved in a particular way, but must also have had a particular mental attitude to that behaviour." See, *Rex v Huggins* 92 Eng. Rep. 518 (1730) "it is a point not

authority; rather it was developed by courts.[137] According to Elliott *et al* there are several reasons that may be advanced to justify the application of the vicarious liability principle.[138] These reasons include: control[139], compensation,[140] deterrence,[141] loss spreading, enterprise liability, mixed policy and indemnity.[142]

It is trite law that for the *actus reus* to be imputed and the *mens rea* of an employee to be attributed on the corporation, there are certain requirements that must be satisfied. These requirements include: a) there must be a crime committed by the employee, b) at the time when the employee committed the crime, the employee must have been employed by the employer, and c) the crime must have been committed whilst the employee was performing

to be disputed, but that in criminal cases the principal is not answerable for the act of the deputy as he is in civil cases: they must each answer for their own acts, and stand or fall by their own behaviour."

[137] C Okpaluba & P Osode *Government Liability: South Africa and the Commonwealth* (2010) 293 describe the principle of vicarious liability as "it is not, in the context of English common law, a distinct tort; rather it is a judge-made concept that holds one person responsible for the misconduct of another because of the relationship between them. Nor is it an aspect of wrongfulness or fault in South African law of delict. Indeed, the principle of vicarious liability is at odds with the general approach of common law."

[138] Elliott *et el Criminal Law* 303.

[139] P S Atiyah *Vicarious Liability in the Law of Torts* (1967) 172; J W Neyers "A theory of vicarious liability" (2005) 43(2) *Alberta Law Review* 1 6; The control rationale entails that it "is justifiable for an employer to be held vicariously liable for the acts of the servant," if such a servant acted pursuant to the command of the master. Thus, by virtue of the power of control which the employer wields over the servant (employee) it is only correct to impute the conduct of an employee on the employer.

[140] *Limpus v London General Omnibus Company* (1862) 158 ER 993 at 998 the court held that it is necessary for "[i]njuries that occasion as a result of an act committed by an employee in the course of his or her master's service to be compensated by the master."

[141] See, *Bazley v Curry* [1999] 2 SCR 534 paragraph 30 the court reasoned that "(…) beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced (...). Holding the employer vicariously liable for the wrongs of its employee may encourage the employee to take such steps, and hence reduce the risk of future harm".

[142] Neyers (2005) *Albert Law Review* 15 argues that the justification of vicarious liability principle is apparent "in the relationship between employer and employee – namely, in the employer's implied promise contained in the contract of employment that indemnify the employee for harms, including legal liability, suffered by the employee in the conduct of the employer's business."

his duties in the course of employment.[143] These elements are the anchors of vicarious liability.[144]

In sum, the lack of legislative will that manifested at the early developmental stages of corporate criminal liability tied with the then legal position in which corporations were deemed incapable of committing any offence accounts for the reluctance to fully apply "corporate criminal liability in civil law legal systems."[145] Another important point to note is that, even in common law states – the advancement of the principle of corporate criminal liability followed a dissimilar path from one country to another. In some states it developed by the instrumentality of theories such as vicarious liability, identification, aggregation and corporate culture. The discussion that follows analyses the origins and developmental stages of corporate criminal responsibility scheme from the common law and mixed legal system states, namely: USA, UK, Sweden, South Africa and Namibia.

2 3 1 1 The USA perspective

Already during the 18th century the notion of corporate criminal liability was known and applied in USA. The mode of liability was based on vicarious liability and included offences related to public nuisance. In order for a body corporate to be found criminally responsible, it was required to prove that there was a failure on the part of the corporation to perform a certain function (nonfeasance) or there was a positive or improper conduct that violated a statute (misfeasance).[146] Moreover, local government units and private businesses were held criminally liable for public nuisance in circumstances where local government officials

[143] Zinnecker (1985) *Brigham Young University Law Review* 322 posits that "[t]he proponents of the course of employment rule have been concerned primarily with its deterrent effect (…) and have said that if holding a corporation liable will encourage it to exercise closer control over its employees for the prevention of outrageous torts, that is sufficient ground to hold corporation liable. Thus, a corporation facing the threat of punitive damages will exercise greater care over its employees and recurrence of similar tortious conduct will thereby be avoided."

[144] J Neethling, JM Potgieter & PJ Visser *Law of Delict Fifth Edition* (2006) 341.

[145] Bernard (1984) *Criminology* 3 argues that "the concept of corporate criminal liability did not develop at all in civil law countries, where all criminal liability is laid to individuals, and none to corporation itself".

[146] *State v Morris and Essex Railroad Co*. (1852) 23 NJL 360.

and or employees of private businesses "failed to adequately maintain roads and waterways that ran through their jurisdictions."[147]

According to Bernard, it was relatively easy for courts to hold private corporations criminally liable because "[p]rivate corporations were chartered with specific public functions – thus, the failure to perform these chartered public functions, for example failure to maintain roads, the corporation itself could be prosecuted for public nuisance".[148] The early 19th century accounted for increased formation and registration of corporations wrought by industrialisation, construction of infrastructures and development. These developments led to increased corporate activities, including negative activities such as corporate bodies' involvement in committing offences.

To regulate corporate conduct and to avoid punishing employees whose conduct benefited the corporation, the principle of corporate criminal liability became entrenched in American statutory law. In this regard, the Elkins Act 1903 was promulgated and it provided that:

> "In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier, as well as of that person."[149]

The effects of the Elkins Act 1903 included that courts, by virtue of statute, could attribute criminal intent on corporations as opposite to mere judicial interpretation as was the practice prior to promulgation of the Elkins Act 1903. In the landmark case of *New York Central and*

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[147] *Queen v Great North of England Railway* (1846) 114 Eng Rap 492 at 1298 the blurring nature and the challenge of distinguishing between nonfeasance and misfeasance was recognized by the court when it considered whether "If A is authorised to make a bridge with parapets, but makes it without them, does the offence consists in the construction of unsecured bridge or in the neglect to secure it?". This expression entails that it is sometimes difficult to distinguish between nonfeasance and misfeasance, thus the distinction is merely philosophical as the unlawful conduct could easily be classified as both nonfeasance or misfeasance.

[148] Bernard (1984) *Criminology* 6.

[149] Elkins Act 1903, c708, (32 stat 847).

Hudson River Railroad Co v United States[150] it was found that attributing criminal intent on the corporation is one of the effective ways of enforcing the law.[151]

Further, in the USA, concerted efforts to criminally punish the offending corporation increased owing to corporate scandals. The analysis on the current USA laws on corporate criminal responsibility indicates a steady shift from corporate fault based on vicarious liability to a corporate culture model. As stated in chapter 1, the underpinning rationale of corporate culture is to hold corporations directly criminally liable. This differs from the approach of predicating a guilty finding against a servant of a company. This assumption is apparent from different statutes, including the *Foreign Corrupt Practices Act*, 1977 (FCPA 1977). The object of the FCPA is to criminalise, prevent and combat corporate bribery.

The FCPA 1977 was amended in 1988 by the *Trade Act* 1988.[152] The effect of the amendment was to amend the Security Exchange Act 1934 by introducing three fundamental provisions related to obligations of issuers (corporations),[153] namely (a) the obligation to adopt appropriate accounting standards and maintenance of internal accounting control system; (b) the obligation to keep records, books and corporate accounts accurately; [154] and (c) the anti-bribery provision proscribing corporate corruption.[155] Further indication of the shift in approach, can be identified from the promulgation of the *Sarbanes-*

[150] (1909) 212 U.S. 481.

[151] *New York Central and Hudson River Railroad* Co at 495 the court stated "we see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in subject matter (…) and whose knowledge and purpose may well be attributed to the corporation for which the agents act. (…) to give them (corporation) immunity from all punishment because of the (…) doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject matter and correcting the abuses aimed at."

[152] Title V, 102 Stat. 1107 (1988).

[153] Title 15 U.S.C Section 78dd-1(g).

[154] M V Sietzinger "Foreign Corrupt Practices Act: Congressional Interest and Executive Enforcement" (2010) CRS Report for Congress available <http://www.crs.gov> (accessed 2014/09/01).

[155] Sietzinger (2010) Report for Congress.

Oxley Act of 2002,[156] the *Dodd-Frank Wall Street Reform and Consumer Protection Act* of 2010[157] and the adoption of the Model Penal Code.[158]

Apart from providing for direct corporate criminal liability, these statutory frameworks place a duty on corporations to put in place appropriate control and managerial measures such as corporate policies and effective compliance programmes that are aimed at preventing corporations from committing crimes. Park and Song noted that these criminalisation-cum-preventive efforts "[a]llows a corporation to avoid criminal liability from attaching where a corporation demonstrates that a supervisor acted with due diligence to prevent the commission of a crime."[159]

Vicarious liability alone as a premise for finding corporations liable may no longer be sufficient. That is, to effectively bring an end or thwart impunity for the perpetration of crimes by corporations, another model, for instance the *rational actor* (corporate culture) model must be adopted. In USA background, it appears that the principle of corporate criminal responsibility, which originated from court interpretation of the "master's liability for the acts of his or her servant", has developed into the aggregation theory and the corporate culture theory, and these approaches are currently provided for in several legislative schemes.

The liability of corporations (including, transnational corporations) in the USA, extends beyond the sphere of criminal law. Example in point is the Alien Torts Claim Act of 1789 which have significantly made inroads in corporate liability. This legislation empowers the Federal Courts with the extraterritorial jurisdiction to adjudicate over civil matters involving corporations. Its impact cannot not be overstated, in that several cases have been brought before the US courts for gross human rights violations which were committed outside the borders of the USA. Some of the cases which were brought before the federal courts are:

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[156] Publication No. 107-204, §§ 802 -807, 116 Stat. 745 (2002).
[157] Publication No. 111-203, 124 Stat. 1376 (2010).
[158] USA Model Penal Code (1985).
[159] Park *et al* (2013) *American Criminal Law Review* 731.

Talisman Energy Inc, Ester Kiobel and Others (Nigeria Shell case) and Unocal case. These cases are discussed in chapter 4 of this dissertation.

2 3 1 2 The UK perspective

The early corporations (association of persons) in the United Kingdom (UK) were treated and had characteristics that were comparable to those of the Guilds. Thus, corporations had limited capacity. During the 17th century, the numbers of unincorporated joint stock companies increased and their involvement in commission of offences became prevalent to such an extent that the Bubble Act of 1720 was promulgated to regulate the creation of corporations. Notably, the Bubble Act 1720 placed a limitation on the establishment of corporations – thereby requiring that corporations were to be "[e]stablished by virtue of an Act of Parliament and that corporations could only act within the remit of their constitutions."[160]

The Bubble Act 1720 was repealed and subsequent to its repeal corporate activities increased enormously. In UK, body corporates were recognized as juristic persons and consequently the acts of employees could be imputed onto the corporation by means of either the identification or the vicarious liability theory. However, the application of vicarious liability had certain limitations, namely: it was only applied to regulatory offences or offences requiring no intent. Consequently, the advancement of corporate scheme – appears – to have been more influenced by the identification theory.

In essence, the identification theory provides that for a servant's conduct to be construed as that of the campany, such an employee must occupy a position in a corporation with necessary authority to direct and control the activities of a corporation.[161] Thus, the conduct of the employees who occupy low level positions in a corporation may be excluded or may

[160] See, W Laufer *Corporate bodies and guild minds: The failure of corporate criminal liability* (2008) 11.
[161] The application of this principle in this form has a history. See, in *Lennard's Carrying Co Ltd* 713 the court held that "[a] corporation is an abstraction, therefore, its active mind and directing will should be sought in its employees who are really the very ego and centre of its personality."

not be imputed onto the corporation. The acts that could be attributed to corporations were limited to acts of employees who controlled and directed the affairs of a corporation. Denning LJ applied the identification theory in *HL Boulton (engineering) Co. Ltd v TJ Graham and Sons Ltd*[162], in which he stated that:

> "(…) others are directors and managers who represent the directing mind and will of the company and control what it does – the state of mind of these managers is the state of mind of the company and is treated by law as such."[163]

In the UK, a company may attract liability for conduct that constitutes a crime, if and when such conduct was committed by its employee, and provided that such employee is "sufficiently senior or occupies a senior position within the rank and file of the corporation in order for his or her conduct to constitute the corporation's directing mind and will."[164] It is important to state that, notwithstanding, the scope and nature of the identification theory and vicarious liability which are delimited and formulated by courts as a result of judicial interpretation, these theories were transformed and became entrenched into UK statutory law.

The promulgation of the *Corporate Manslaughter and Corporate Homicide Act* 2007[165] is perceived as a much better step in the right direction. This is because it has increased focus on the role of corporations in everyday life. It represents an important development in the English law on liability of body corporates, even though, the corporate scheme is limited to certain type of offences. Despite the identified limitation, the principle is clear: body corporates do not enjoy impunity – because, companies stand to criminally account if the

[162] [1957] 1 QB 159.
[163] *HL Boulton (Engineering) Co Ltd* 172.
[164] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153; *Meridian Global Funds Management Asia Ltd v Security Commission* [1995] 2 AC 500.
[165] Corporate Manslaughter and Corporate Homicide Act 2007 Chapter 19, Royal assent 26 July 2007 (entry into force 6 April 2008 – United Kingdom).

manner in which it is "managed or organised cause the death of a person"[166]or where corporate activities "amount to gross breach of a relevant duty of care owed to the deceased."[167] The risk-creating activities of corporations can now form the basis for criminal liability under English law, akin to the reckless individual who caused the death of another.

2 3 1 3 The Namibian and South African perspectives

South Africa and Namibia share a significant historical and legal background. It is worth noting that laws that regulate corporate conduct in South Africa are similar to the laws that are applicable in Namibia. The similarity is so obvious that discussing these two jurisdictions separately on this particular topic, may amount to a substantive repetition. Therefore, on this premise, these two jurisdictions are discussed together. In these jurisdictions, the development of corporate scheme is attributed to the innovative judicial interpretation vicarious liability.

The legal position on corporate liability before the promulgation of the Criminal Procedure and Evidence Act[168] in 1917 was constructed on the delictual principle of "vicarious liability". Nana observes that courts used to "[i]mpose liability on corporations in their capacity as employers".[169] Notably, liability was attributed on the corporation if it was established that a servant, while "in the course of employment", committed a wrongful act. As a general rule, these wrongful acts were imputed on the corporation. The other example where liability was

[166] Section 1(1)(a) of Corporate Manslaughter and Corporate Homicide Act 2007.

[167] Section 2(1) of Corporate Manslaughter and Corporate Homicide Act 2007 defines a "relevant duty of care" as "(a) a duty owed to its employees or to other persons working for the organisation or performing services for it; (b) a duty owed as occupier of premises; (c) a duty owed in connection with(i) the supply by the organisation of goods or services (whether for consideration or not), (ii) the carrying on by the organisation of any construction or maintenance operations; Further defined in section 2(7), (iii) the carrying on by the organisation of any other activity on a commercial basis, or (iv) the use or keeping by the organisation of any plant, vehicle or other thing."

[168] Act 31 of 1917 South Africa.

[169] Nana (2011) *JAL* 89 posits that as "[a] general rule, the liability imposed upon these companies was vicarious in scope and nature, given that they were held liable for the wrongful acts of employees committed in the course of employment."

assigned to the corporation included circumstances where a corporation as an employer failed to provide a conducive and safe working environment for its employees.

The vicarious liability principle was without modification applied to hold corporations criminally liable. It is submitted that substantively, the requirements that were applied to hold corporations delictually liable were the very same requirements that were retained by courts to hold corporations criminally liable. The common law principle of vicarious liability was in 1917 supplanted by section 384 of the South African Criminal Procedure and Evidence Act 31 of 1917. The effect of this provision was to "[r]ender corporations criminally liable for offences committed by directors and servants in their course of employment."[170] The South African Criminal Procedure and Evidence Act of 1917 was repealed by the South African Criminal Procedure Act of 1955 and subsequently by the current Criminal Procedure Act 51 of 1977.[171] This legislation is applicable in Namibia, as the principal legislation that governs criminal proceedings. Thus, currently the principal legislation that governs the principle of corporate criminal liability is the Criminal Procedure Act 51 of 1977[172] and it provides that:

> "For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law-
>
> *(a)* any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and
>
> *(b)* the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,

[170] Nana (2011) *JAL* 90.

[171] Act 51 of 1977 South Africa.

[172] The Act mainly governs and regulates procedures in criminal proceedings. It is important to note, as Amoo *et al* (2009) *University of Botswana Law Journal* 89 posit that "[t]he administration of the Criminal Procedure Act, Act 51 of 1977 (CPA 1977) to South West Africa (now Namibia) was transferred from South Africa in terms of the Executive Powers (Justice) Transfer Proclamation AG 33 of 1979 dated 12 November 1979. More particularly, the application of CPA 1977 to Namibia is made in terms of section 1 which defines 'Republic' to include the territory. Territory in this context refers to South West Africa (Namibia). Further that section 343 entails that the CPA 1977 apply also in the Territory, including Eastern Caprivi Zipfel (now Zambezi region)."

> in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavoring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body."[173]

The provision entails that corporations may be held criminally liable for offences that require intent or for strict liability offences. Liability attaches, "[r]egardless of whether the offence was committed by lower level employees or directors of the company."[174] Of course, there are issues that beg more questions, for instance, are corporations (or other abstract entities) capable of committing offences such as rape? In *NK v Minister of Safety and Security*[175] the South African Constitutional Court applied the vicarious liability principle to hold the state (as the responsible abstract entity) liable for the conduct of three police officers who committed rape whilst they were performing duties or course of employment.[176]

It appears that the legal nature of vicarious liability, *inter alia*, includes that a director may be cited on behalf of the accused company.[177] However, such citation does not lead to the director to personally account – unless where it can be shown that the individual director committed a crime independent from the company. If it can be shown that both the director and the company fulfil the required elements of criminal liability then both can, of course, be criminally charged. The position is that responsibility cannot automatically be attributed to any of the natural persons that are either members or employees of the corporate entity, thus confirming the legal fact that corporations are regarded as independent actors for

[173] Section 332(1) Criminal Procedure Act, Act 51 of 1977 South Africa.
[174] Nana (2011) *JAL* 103 posits that "[l]iability is not only imposed for acts of directors but also for acts of lower level employees of the company."
[175] [2005] JOL 14864 (CC).
[176] *ABSA Bank Ltd v Born Equipment (Pretoria) (Pty) Ltd* 2001 (1) SA 378; *Bezuidenhout NO v Eskom* 2003(3) SA 83 (SCA).
[177] Section 332(2) of Criminal Procedure Act, Act 51 of 1977 provides that "In any prosecution against a corporate body, a director or servant of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he were the person accused of having committed the offence in question (…)."

purposes of criminal liability. Since the corporate entity is still an abstract entity, the legal fiction at work is that the organs of that entity – primarily the directors – will do the thinking and acting and these will be attributed to the corporate entity. This is a one-way street: The converse is not true, so that criminal conduct of the corporate entity is not simply transferred to the individual directors. Their liability, as a matter of principle, ought to be independently proved "*beyond reasonable doubt*" and based on the usual *mens rea* and *actus reus* requirements.[178] This legal proposition was approved in *S v Coetzee*[179] in which the Constitutional Court declared section 332(5) of South African Criminal Procedure Act 51 of 1977 to be unconstitutional. The provision purported to place the onus on "directors or servants" of an accused corporation to prove that they were not parties to the crime and that they could not avert the commission of the offence in question.

Safe, to submit here that the growth of the corporate scheme in common law jurisdiction, as was discussed above, is accredited to or was wrought by judicial interpretation and the application of the principles including vicarious liability, identification theory and the theory of aggregation. There is much debate at domestic level towards adopting corporate culture (*rational actor*) model "as the basis for holding corporations criminally liable.[180] These aspects will be explored below with reference to other comparative jurisdictions."

2 3 1 4 Swedish perspective

Sweden subscribe to the general rule that corporations are not capable, on their own, to commit crimes. However, this legal position does not exonerate corporate directors or employees from being criminally sanctioned. On this point, Hedwall elucidates that "[c]orporate directors or employees may be held criminally liable, if crimes are committed

[178] Kemp *et el Criminal Law* 215.
[179] 1997 (4) BCLR 437 (CC).
[180] Nana (2011) *JAL*104; J Kyriakakis "Corporate criminal liability and the ICC Statute: The comparative law challenge" (2009) 56(3) *Netherlands International Law Review* 333 337.

during the corporation's operations, either in Sweden or abroad by the employees."[181] In the same vein, jointly with the offending employees, the corporations may be liable to administrative penalties or corporate fines. The development of liability of body corporates, particularly in Sweden, is accredited to several legal instruments. Notably, the Swedish Penal Code Chapter 22 section 6 provides that:

> "A person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognized principle or tenet relating to international humanitarian law concerning armed conflict is liable for crime against international law (…)."[182]

This above quoted provision read in conjunction with section 3(6) of Chapter 2 of the Swedish Penal Code which anticipates for a world-wide jurisdiction presupposes that corporate employees' conduct that violate international law, whether committed in the territory of Sweden or abroad may be subjected to the jurisdiction of the Swedish courts. The Swedish corporate scheme was not free from critiques. Such critiques lay, *inter alia*, in terms of section 6 Chapter 22 of the Swedish Penal Code which have been criticised for limiting its scope as it mainly regulates "violations of international humanitarian law,"[183] to the exclusion of other violations under international criminal law.[184]To respond to the criticism on limited scope stated above, Sweden – with effect from 1 July 2014 - adopted the Swedish Code of Statutes.[185] This legislation provides for the substantive law on *international criminal law* in Sweden and it covers all the violations of international criminal law that were committed after 1 July 2014. The significance of the Swedish Code of Statute

[181] M Hedwall "Corporate liability in Sweden" (n.d) Available at <https://globalcompliancenews.com> (accessed on 31 January 2019).
[182] Section 6 of Chapter 22 of the Swedish Penal Code of 1962.
[183] M Klamberg "International Criminal Law in Swedish Courts: The principle of legality in Arklov Case" (2009) 9 *International Criminal Law Review* 395 398.
[184] M Ingeson & A L Kather "The road less travelled: How corporate directors could be held individually liable in Sweden for corporate atrocity crime abroad" (2018) Available <https://www.ejiltalk.org> (accessed on 12 December 2019).
[185] Swedish Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes issued on 28 May 2014 published 11 June 2014 and became effective on 1 July 2014.

cannot be overemphasised. The Swedish corporate criminal responsibility scheme has been praised by many as a trend setter and that it helps to align the Swedish domestic law with that of international criminal law. In this manner, the Swedish Code of Statutes, read in conjunction with the Swedish Penal Code particularly sections 6 of Chapter 22 as well as section 3(6) of Chapter 2 thereof, stretches further and provide that corporate directors or employees who commit international crimes during the corporation's operations may be prosecuted and punished.

The veracity and application of these provisions are evident in the Lundin Petroleum case in which directors in the employment of Lundin Petroleum were in 2018 indicted for international crimes which emanated from the Lundin Petroleum operations in Sudan during the late 1990s to early 2000.[186] The allegations against the directors in this matter, include that the oil extraction operations of Lundin Petroleum ignited a war in Sudan which led to displacements, murders, torture, and rape.[187] Sweden does not recognise direct liability premised on corporate culture – but rather, a corporation may be accountable jointly with the individual offending director or employee of such a corporation.

2 3 2 Development and the exclusion of corporate criminal liability in civil law legal systems

The anti-corporate criminal liability school of thought, including the legal writings of scholars such as Blackstone, opines that corporations cannot commit crimes.[188]Hence, only the corporation's *members* (natural persons) ought to be criminally responsible.[189] The rationale underpinning this perception includes that criminal conviction and punishment is

[186] Ingeson & Kather "The road less travelled: How corporate directors could be held individually liable in Sweden for corporate atrocity crime abroad."
[187] R Milne "Swedish oil bosses set to be charged over South Sudan deaths" (2018) Available at <https://www.ft.com> (accessed on 31/03/2019).
[188] J Hasnas "The discordance of New York central jazz: It is time to abandon the notion of corporate criminal liability" (2010) 33(1) *Regulation* 46 46.
[189] Ehrlich *Ehrlich's Blackstone* 106.

bound up with an enquiry of whether the act of a person presents an independent decision to commit a crime. Thus, this school of thought advocates for the *societas delinquere non potest* principle which presumes that a body corporate is merely a legal fiction – as such it lacks a "body and soul:" hence, a corporation is not capable of taking independent decisions, nor is it capable of committing the necessary *actus reus* and forming the required *mens rea* in *propria persona.*[190]

This presumption entails that corporations by their nature, as abstract entities, cannot act and, further, that imposing criminal sanctions on corporations is inappropriate because, unlike human beings, corporations are not capable of making any moral determination.[191] Despite these philosophical objections of corporate criminal liability within some of the civil law states, since the 1970s some civil law states started to recognise and introduced the corporate criminal liability principle in their penal codes.[192]

The predominance of the rational actor model as a preferred type of business making decision over other types of business management and decision is noted in this regard. Because of this type of business decision making model there has been "[a] shift from liability based on imputing individual behaviour to the corporation to the original liability based on organisational deficiencies."[193] In the discussion that follows the focus is on selected civil law jurisdictions that are relevant to the discussion at hand – these jurisdictions are Germany, France and Italy.

2 3 2 1 The German perspective

In Germany and the Germanic laws do not recognize the principle of corporate criminal liability. This legal position exists, notwithstanding the fact that corporations are recognized

[190] AI Pop "Criminal Liability of Corporations: Comparative Jurisprudence" (2006) available at <http://digitalcommons.lawmsu.edu/king/81> 6-9 (accessed 12/01/2015).
[191] T Weigend "Societas Delinquere non Potest? A German Perspective" (2008) 6(5) *JICJ* 927 929.
[192] See, article 121-2 French Penal Code of 1992.
[193] Kyriakakis (2009) *Netherlands International Law Review* 342.

as real subjects of law.[194] The theoretical objections that under lie the exclusion of corporate criminal liability in Germany include that only human beings are capable of committing crimes. Therefore, it is perceived that any criminal sanctions imposed on legal fictions such as companies – departs from the basic and settled criminal law rules, which proffers that for a person to be criminally liable – such person must be capable of committing an act and possesses the necessary guilty mind. Kyriakakis posits that among the decisive factors that led Germany to opt for administrative penalty include that "[a]dministrative sanctions are considered morally neutral and they lack the stigma associated with criminal sanctions."[195]

Penalties in this context do not require punishment by imprisonment, rather the effect thereof is mainly the restoration of the harm caused and not retribution. It is argued that these theoretical and penological objections undermine the object of putting an end to the current *de facto* and *de jure* impunity enjoyed by corporations. It is demonstrated in chapter 4 of this dissertation that modern corporations are capable of committing crimes in a myriad of ways.

The German position can be juxtaposed with the *rational actor* or *corporate culture theory* that entails that a corporation is a functional unit or institution that musters its human and capital resources towards the full realisation of its corporate objectives and goals. Hence, corporations are capable of developing policies and take decisions necessary to advance their interests including profiting from such decisions. Despite the exclusion of corporate criminal responsibility *proper* in the German legal scheme, alternative mechanisms are put in place to sanction the offending corporations and representatives of such offending corporations. These alternative mechanisms include liability for administrators of corporations and the administrative fines imposed on corporations or association of persons. The German Criminal Code provides in para 14 that:

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[194] M Catargiu "The origin of criminal liability of legal persons – A comparative perspective" (2013) Vol 3 *International Journal of Judicial Sciences* 26 30.

[195] Kyriakakis (2009) *Netherlands International Law Review* 342 344.

"(1) If a person acts:

1. in his capacity as an organ authorised to represent a legal entity or as a member of such an organ;

2. as a partner authorised to represent a partnership with independent legal capacity; or

3. as a statutory representative of another,

any law according to which special personal attributes, relationships or circumstances (special personal characteristics) form the basis of criminal liability, shall apply to the representative, if these characteristics do not exist in his person but in the entity, partnership or person represented."[196]

By virtue of the above quoted provision, and further taking into account the German Code of Administrative Offences,[197] it can be deduced that although corporate criminal responsibility is excluded from the German's penal code: certain officers – especially administrative officers in senior positions may be subjected to criminal sanctions for the conduct of the body corporate which they are appointed to manage. For administrative sanctions to attach, it must be proved that a corporation failed in its stated organisational aims and functions.[198]

It is worth stating that recently, the principle of corporate criminal responsibility has been subjected to rigorous debate in Germany. These debates came after the tabling of the Draft

[196] German Criminal Code promulgated on 13 November 1998 published in the Federal Law Gazette I p. 3322 as Amended by Art 1 of the Law of 24 September 2013 published in the Federal Law Gazette I p. 3671 and as Amended by Art 6(18) of the Law of 10 October 2013 published in the Federal Law Gazette I p. 3799.

[197] Section 30 of the German Code of Administrative Offences provides for fines that may be issued against a juristic person "(1) Where someone acting: (a) as an entity authorized to represent a legal person or as a member of such an entity; (b) as chairman of the executive committee of an association without legal capacity or as a member of such committee; (c) as a partner authorized to represent a partnership with legal capacity; or (d) as the authorized representative with full power of attorney or in a managerial position as procura-holder or the authorized representative with a commercial power of attorney of a legal person or of an association of persons referred to in numbers b or c; (e) as another person responsible on behalf of the management of the operation or enterprise forming part of a legal person, or of an association of persons referred to in numbers (b) or (c), also covering supervision of the conduct of business or other exercise of controlling powers in a managerial position – has committed a criminal offence or a regulatory offence as a result of which duties incumbent on the legal person or on the association of persons have been violated, or where the legal person or the association of persons has been enriched or was intended to be enriched, a regulatory fine may be imposed on such person or association."

[198] Kyriakakis (2009) *Netherlands International Law Review* 345.

Bill on Corporate Penal Code (Draft Bill) in November 2013. Section 2 of the Draft Bill, creates two corporate offences, namely: (a) infringement by decision makers; and (b) failure to prevent the infringement. Kuhn argues that "for these criminal offences to be committed, it does not require the guilt of an individual perpetrator to be established."[199] Rather, what is required is proof that the corporation's decision making structures were sufficiently seized with knowledge related to the infringement. Further that, despite this knowledge, the structure of the body corporate did not endeavour to avert the alleged infringement.

An analysis of the arguments, on which the Draft Bill is anchored includes, *firstly*, employees and agents often assume the blame where in actual fact the corporations ought to have assumed such blame collectively. In this manner, employees are construed as sacrificial lambs for the crimes committed by the corporations. *Secondly*, it has increasingly became apparent that administrative fines are ineffective in the face of globalisation, industrialisation and internationalisation (free movement of labour, services and powers of transnational corporations). Indeed, Rubenstahl and Brauns identify that what exacerbates the ineffectiveness of administrative fines is that administrative fines can be exploited by corporations "since the asset recovery can be calculated and weighted against the infringement."[200]

It follows that, as far as doctrinal development is concerned, the Draft Bill seems set the stage for further deliberations on criminal liability of body corporates. This is so because, the Draft Bill seeks the introduction and recognition, for the first time, the corporate criminal liability proper and it is referred to as the first of its kind in the long history of corporate responsibility laws in Germany.[201]

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[199] Kuhn (2014) *Simons & Simons Elexia* 2.
[200] M Rubenstahl & C Brauns "Trial and Error – A critique of the New German Draft Code for a Genuine Corporate Criminal Liability" (2015) 16(4) *German Law Journal* 871 874.
[201] Rubenstahl & Brauns (2015) *German Law Journal* 871.

2 3 2 2 The French perspective

In France, the concept of *legal person* is known as *moral person*. Thus, in this context the concept of legal person is used interchangeably with the concept of moral person. Historically – before the revolution in France, companies were recognized as legal persons which could be subjected to criminal prosecution and sanctions. Consequently, the principle of corporate criminal liability was applied. This principle was provided for in terms of the French Criminal Ordinance of 1670. However, because of the French Revolution certain limitations were imposed, including the suppression or prohibition of freedom of association.[202]

Limitation on freedom of association which was the predominant factor that led the French to abandon the criminal liability of body corporates. Another attack that was directed at disbanding the criminal liability of body corporates was premised on the insistence and rigid interpretation of *ultra vires* principle. Catargiu pointed out that the *ultra vires* principle provides that a juristic person is limited to act within a given mandate.[203] The given mandate in this context included the object of the corporation, and the object ought to have been allowed or approved according to the precepts of the law.[204]

Therefore, at law and in terms of public policy, no corporation could be formed with an object of committing crimes. These policy considerations influenced France to adopt the principle of individual criminal liability in its criminal code. In France, the general criminal liability rule was that "no one is criminally liable except for his own conduct".[205] The underpinning theory of punishment entails that criminal liability attaches to an individual person as contrasted to juristic persons or collective entities.

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[202] See, Catargiu (2013) *International Journal of Judicial Sciences 27* posits that "the French Code of 1810 repealed the criminal liability of moral persons, consequently after the French Revolution legal persons under private law vanished due to the prohibition of freedom of association."

[203] Catargiu *International Journal of Judicial Sciences* 27.

[204] See, for instance in the Namibian context – Section 59(1) of the Companies Act, Act 28 of 2004.

[205] Article 121-1 of the 1994 French Criminal Code.

However, the effects of industrialisation, globalisation and increased business activities including increased negative activities such as commission of crimes by corporations, influenced France to re-introduce the principle of corporate criminal liability.[206] In terms of the French Criminal Code of 1994 it is provided that:

> "Legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in articles 121-4 and 121-7."[207]

It is apparent that the acts that may be imputed on the corporation must be the acts of an employee who is in a senior position or an employee who form part of the governing body of such a corporation. The acts, as a requirement, should be committed on the behalf of or in body corporate's name. The quoted provision discloses that the provision is wide enough to cover the crimes committed by subsidiary entities. This proposition is premised on the French Criminal Code that makes reference to "*their organs"* in paragraph 1 of article 121-2. The inference made in the article above supports a submission that "*their organs"* may include subsidiary entities when they represent the parent corporation.[208]

2 3 2 3 The Italian perspective

In Italy, the criminal responsibility of corporations is not recognized, nor is it construed to be a genuine model through which liability may attach. The Italian Constitution provides that "criminal responsibility is personal."[209] Kyriakakis noted that the Italian Constitution's criminal responsibility provision "[i]s the most significant obstacle to the adoption of corporate criminal liability in Italy."[210]The other factor that influenced Italy to adopt administrative or

[206] Amann (2001) *Hastings International and Comparative Law Review* 332.
[207] Article 121-2 of the French Criminal Code.
[208] Catargiu (2013) *International Journal of Judicial Sciences* 28.
[209] Article 27 (1) of the Italian Constitution.
[210] Kyriakakis (2009) *Netherlands International Law Review* 345.

civil sanctions against offending corporations, includes "[I]taly's desire to harmonise its national laws with the European Conventions."[211] The European conventions places positive obligations on its members to adopt, *inter alia*, legislations or legal schemes which contemplates to hold offending corporations liable.[212]

Thus, the desire to implement these European Conventions and taking into consideration the constitutional criminal liability clause that limits criminal liability to natural persons led Italy to adopt administrative liability for corporations as a compromise.[213]

The other instrument that may be invoked when discussing the concept of corporate criminal liability is the *Italian Legislative Decree* 231/2001. This decree provides that the conduct of the employee of a company "can be imputed" onto the company if the offending conduct in question was committed in the corporation's interest or for its benefit.[214]It is worth to note that the offending conduct in question is not limited to the conduct of employees in senior positions or positions of authority.[215] Rather, conduct that may be imputed on the corporation, includes offending conduct of subordinate staff.[216] On this score, the Italian law on corporate liability (albeit *administrative* in nature) is comparable to the *corporate culture theory,* in the sense that to avoid liability from attaching, a body corporate should show that "it has established certain effective system of control and supervision over the behaviour of corporate employees."[217] Even though the Italian model is not *per se* a genuine form of corporate criminal liability – it cannot be over emphasized that there exisist some doctrinal support to construct a model of responsibility based on corporate culture theory.

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[211] Kyriakakis (2009) *Netherlands International Law Review* 347.
[212] Article 9(1) of the Council of Europe Convention on the Protection of the Environment Through Criminal Law of 1998; Article 18 of the Council of Europe Criminal Law Convention on Corruption of 1999 came into force 1 July 2002.
[213] Italian Legislative Decree 231/2001 issued on 2001 June 8.
[214] Art 5(2) of the Italian Legislative Decree 231/2001.
[215] Art 5(1)(a).
[216] Art 5(1)(b).
[217] Kyriakakis (2009) *Netherlands International Law Review* 346.

2 4 Analysis on doctrinal development

The origins of the criminal responsibility of companies in common law states is attributed to judicial interpretation (case law), which in turn became entrenched into domestic legislations. The development of this principle appears to grow from strength to strength – that is, the principle which was once almost universally unrecognized, is now recognized in most states. For instance, France following the French Revolution, abandoned the principle of corporate criminal liability, only to later re-introduce it – chief reason for this re-introduction is much owed to industrial development and increased corporate activities, of which some of these corporate activities without doubt constitute criminal conduct that are proscribed and sanctioned as criminal.

From the civil law states, there are measures put in place, other than criminal liability, that contemplates to hold corporations liable for conduct that constitute an offence. Suffice to state that the adopted mechanisms of holding corporations liable within the civil law states are significantly different from one jurisdiction to another. States such as France provide for corporate criminal liability which can be contrasted from the practice in Germany and Italy which do not sanction offending corporations with criminal sanctions.

One important distinguishing factor underpinning these measures (administrative penalties) is that they are accepted to be "morally neutral and without stigma because they relate to offences that cannot be punished by imprisonment if committed by natural persons".[218]It is argued that the impact of an administrative penalty which is primarily aimed at restoration of the harm caused may not be an effective measure to deter corporations from committing crimes.

In fact, it is submitted that at present, criminal sanctions against corporations are the subject of much debate and some scholars argue that the use of civil sanctions and

[218] Kyriakakis (2009) *Netherlands International Law Review* 345.

administrative fines is not very effective, especially "where the cost of harm exceeds the damages that are likely to be imposed on the corporation".[219] In contrast, the stigma associated with criminal sanctions appears to be more effective in situations where the fine imposed is less than the harm caused.

It is worth noting that the principle of corporate criminal liability is not only recognized in common law legal systems, but that it is also recognized in some of the civil law states. However, the main concern is not necessarily in its recognition *per se* but in its application. This concern lies in the fact that there is no uniform manner in which the principle of corporate criminal liability may be applied at international level for purposes of providing guidelines for domestic jurisdictions. For instance, in SA and Namibia, companies are not directly accountable, instead, an indirect liability scheme is applied – that is companies may be criminally responsible by the instrumentality of vicarious liability principle.

The practice of holding corporations liable based on vicarious liability can as well be identified with the practice in the USA, notwithstanding the current USA's shift to direct liability schemes based on corporate culture. The indication of this shift lies in several legislation that require intention of the offending corporations to be derived or inferred from the corporations' policies, management and organisational behaviour.

The holistic approach to corporate liability that is practiced in some of the common law states, that is, holding corporations criminally liable based on the rational actor model or corporate culture model. This is commendable as a good milestone achieved – considering the complex nature of corporations. It is was submitted above that "even in common law states where" the principle of corporate criminal responsibility was received suffer from lack of a unified theory on which the corporate criminal liability may be founded. For instance, the analysis of the UK legal mechanism indicates that offending companies may attract

[219] Khanna (1996) *Harvard Law Review* 1479.

criminally responsibility by means of the identification theory. By contrast, and from a SA perspective, guilt is founded on the utilisation of vicarious liability.

The factor that differentiates the identification theory from vicarious liability, among others, include: the former requires that the employee or agent of the corporations must be in a position of authority (senior position) and that such employee's conduct should be identified with the company ("as the directing mind and will"). The UK, just like USA, appears to be shifting at least in principle to the practice of responsibility based on the culture of the entity, for instance, the (UK) Corporate Manslaughter and Corporate Homicide Act of 2007 provides that company intent can be "inferred from the manner in which the corporation is managed."[220] These innovations, without doubt represent or are good indicators that the corporate scheme is not static – rather, it is gaining new heights and commands to be recognized as a competent form of criminal responsibility.

2 5 Conclusion

A comparative and selective overview reveals that the application of corporate criminal responsibility, sharply differs. These differences in the application of the principle exacerbate the dissonance at domestic levels. From this baseline proposition we work our way towards the central argument in this dissertation, namely that this domestic dissonance in the application and enforcement of corporate criminal scheme can, to a significant extent, be remedied by a coherent international approach to corporate liability for systemic crimes, including the core crimes. The dogmatic confusion and fragmentation can, over time, disappear if there is a strong international institutional through which corporate criminal responsibility can be developed. Further, that such a platform may be used to ratchet corporate liability scheme to the level where it may be universally accepted as a mode of liability for atrocity crimes. This will require a top-down approach, and not an organic bottom-

[220] See, a discussion on the UK perspective in section 2 3 1 2 if this chapter.

up approach, given the varying modalities and principles underpinning corporate liability at the domestic level. The submission here is that the Rome Statute of the ICC, despite all its flaws, may yet be the best vehicle for such a unifying project. First, we need to go back in history to see how this topic of corporate criminal liability was treated at the other international criminal tribunals. That is the topic of the next chapter.

Chapter 3

The principle of corporate criminal liability and the international criminal tribunals: the unfinished business from Nuremberg to The Hague and beyond

3 1 Introduction

The preceding chapter briefly analysed the origins and development of the principle of corporate criminal responsibility at domestic level. In this chapter the analysis focusses: firstly, on the practice and the legacy of the Nuremberg trials. Secondly, a discussion on the trials which were held in terms of the Control Council Law 10[221] will be provided. Thirdly, the chapter provide an analysis from selected international criminal tribunals that followed in the historical footsteps of Nuremberg, such as: the ICTR; the ICTY; the Special Court for Sierra Leone (SCSL); and the jurisprudence from the ICC. The chapter further discusses the motivations and rationales behind the withdrawal of Draft Article 23(5) from the Rome Statute of the ICC. Fourthly, the chapter identifies relevant developments at the regional and domestic levels that may be useful in terms of developing proposals for the inclusion of corporate criminal liability at the international level, specifically the ICC.

3 2 Legacy of Nuremberg trials

The Nuremberg trials present an invaluable and rich foundation of international criminal law. The Nuremberg trials had a profound impact on the principle of corporate criminal responsibility. This is because they served as the first international adjudications on corporate involvement in systematic criminal behaviour constituting crimes under international law.

[221] Control Council Law No. 10 Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity of 20 December 1945, Official Gazette Control Council for Germany 50-55 (1946).

3 2 1 Corporate criminal liability and the Nuremberg trials

True to the intention of punishing the perpetrators of the atrocities committed in occupied Europe by the Nazi regime, the Allied Powers[222] concluded several agreements – notably, the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*[223] and the constitutive instrument of the International Military Tribunal (IMT).[224] Premised on these instruments, the IMT had jurisdiction over three international crimes, namely: "crimes against peace"[225], "war crimes,"[226] and "crimes against humanity."[227] Further, the IMT had jurisdiction "[t]o try and punish persons responsible for the perpetration of the atrocities as individuals or as members of organizations."[228]

For present purposes reference is made to the Nuremberg trials, meaning a "[nu]mber of trials that were held in Nuremberg, Germany."[229] These trials can be broadly clustered into

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[222] Allied Powers in terms of paragraph 4 of the Preamble of the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* of 8 December 1945 and article 1 of the Charter of the International Military Tribunal of 8 August 1945 refers to states such USA, France, UK, and Soviet Union (Russia).

[223] 08 August 1945; Moscow Declaration of 30 October 1943 pertaining to the prosecution and punishment of German War Criminals in the countries in which atrocities were committed; Control Council Law 10 of 20 December 1945.

[224] Charter (Constitution) of the International Military Tribunal (IMT) of 08 August 1945 in London. It is also known as the Nuremberg Charter.

[225] Art 6(a) provides that Crimes against peace includes "planning, preparation, initiation or waging of war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in common plan or conspiracy for the accomplishment of any of the foregoing."

[226] Art 6(b) provides that War crimes includes "violations of the law and customs of wars. Such violations shall include, but not to be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoner of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

[227] Art 6(c) provides Crimes against humanity includes "murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

[228] Art 6.

[229] D Bloxham "From the International Military Tribunal to the Subsequent Nuremberg Proceedings: The American Confrontation with Nazi Criminality Revisited" (2013) *The Journal of the Historical Association* 567 567 posits that "Nuremberg refers to both the event and process or the prosecution , in the German city of that name, of twenty-two senior German figures and six organisations before the IMT in 1945-6 (…) or may connote not just the IMT trial but also the twelve subsequent trials before the NMTs conducted in 1946-9 by the American occupation authorities against major war criminals of the second rank."

two groups: The *first* group consisting of the criminal proceedings that were heard by the IMT, in which high ranking German officials and six organisations were brought before the IMT.[230] The corporations were brought before the IMT not necessarily for prosecuting and punishing them, but for determination as to whether such corporations were criminal organisations or not.[231] The effect of the declaration of a corporation as criminal organisation will be dealt with below. The individuals who were brought before the IMT were suspected to be the major war criminals.[232] The *second* group refers to the criminal proceedings that were brought before national courts of the Allied Powers as constituted in the demarcated zones, hereinafter referred to as the Nuremberg Military Tribunals (NMTs). The trials under the NMTs include the trials[233] which mainly dealt with war criminals that may arguably be referred to, in the words of Bloxham – as "the major war criminals of the second rank"[234] and lesser, including leaders of certain corporations.[235] These NMTs were constituted under the "[a]uspices of the Allied Powers as provided for by the Control Council Law 10."[236]

The conception of the IMT and its jurisprudence can be distinguished from the subsequent *ad hoc* international criminal tribunals (ICT) including the ICC. The Nuremberg trials are generally construed as the birth or inception of international criminal law and these

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[230] Bloxham (2013) *The Journal of the Historical Association* 567.

[231] See, Article 9 of the Charter of the IMT.

[232] See, Paragraph 3 of the Preamble of the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*.

[233] *US Military Tribunal Nuremberg, (United States of America v Carl Krauch et al.)* ("*Carl Krauch*") judgment of 30 July 1948, in Trials of War Criminals Before the Nuernberg Military Tribunals, Vol. VIII; *US Military Tribunal Nuremberg (United States of America v Flick et al) ("Flick et al")*, judgment of 22 December 1947, in Trials of War Criminals Before the Nuremberg Military Tribunals, Vol. VI.

[234] Bloxham (2013) *The Journal of the Historical Association* 567.

[235] See, T Taylor *The Anatomy of the Nuremberg Trials: A Personal Memoir* (1993) 269 noted that "the Moscow Declaration of November 1943 had distinguished between major war criminals who would be punished by the joint decision of the Allied Powers and those miscreants of lesser stature who would be dealt with by national courts". Further see, Paragraph 2 of the Preamble of the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* which provides that "and whereas the Moscow Declaration of 30 October 1943, on German atrocities in occupied Europe stated that those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they be judged and punished according to the laws of these liberated countries and of the free Governments that will be created therein".

[236] See, G Werle & F Jessberger *Principles of International Criminal Law* 3ed (2014) 11-12.

trials provided the contours of "substantive body of law" at international level and "procedural aspects" of the subsequent development of the body of law that we know today as international criminal law.[237] The constitutive instrument of the IMT provided for substantive law on liability of body corporates, ranking it as the first international instrument which contemplated to advance the principle of corporate criminal responsibility.

Furthermore, the IMT was the first international tribunal that successfully adjudicated over corporations, even though the effect of such adjudication was merely to declare the corporations as criminal organisations as opposed to punishing such offending corporations. The reason as to why the IMT opted not to punish corporations for their complicity in the commission of the atrocities was not because there was no evidence that implicated the corporations, but that the IMT adopted the position that criminal responsibility, ultimately, is *personal* (meaning natural persons, not abstract entities). Consequently, it was assumed that abstract entities were incapable of committing crimes. In *Trial of the Major War Criminals (Göring and Others)*[238], the Tribunal famously stated:

> "Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[239]

Prior to the above quoted judgment, individuals had no *locus standi* under international law. That is, natural persons were not "recognized as subjects of international law."[240] The

[237] F Jessberger "On the origins and individual criminal responsibility under international law for business activity" (2010) 8 *Journal of International Criminal Justice* 783 798.

[238] *Trial of the Major War Criminals before the International Military Tribunal*, ("*Goring and Others*") 1946, IMT Volume XXII, Judgment and Sentencing of the Afternoon Session of the Two Hundred and Seventeenth Day, Monday 30 September 1946.

[239] *Trial of the Major War Criminals before the International Military Tribunal Volume XXII,* (1948) 466.

[240] J Dugard *International Law: A South African Perspective 3ed* (2005), 1 - 2 posits that "Individuals benefit from the protection of international law and participate in its process, but they cannot be described as full subjects of international law."

general rule under international law then was that international law was concerned with regulating state conduct and not individual conduct. In this context, it was perceived that when an individual act in the interests (behalf) of the state – such actions could not attract individual liability under international law. Rather, such acts were attributed to the state. For this reason, an individual person's conduct was "protected by the doctrine of the sovereignty of the state."[241] Understood from this position, it can be concluded that the principle of individual liability appeared to be more of an exception, rather than a general rule. However, by virtue of the IMT's judgment quoted above, the exception was elevated and made to be the mainstay principle of international criminal law.

3 2 1 1 Aspects of the substantive law on corporate criminal liability

A literal reading of the text of the constitutive instrument of the IMT may be construed so as to provide and recognize liability of companies. This submission resonates in terms of the Charter of the IMT which conferred onto the IMT the jurisdiction to hear matters that were concerned with the determination (declaration) of whether the corporations that participated in the commission of atrocities were criminal organisations or not. The principal provision in this regard provided that:

> "At the trial of any individual member of any group or organisation the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation."[242]

Moreover, in terms of article 10[243] of the constitutive instrument of the IMT, the legal nature of the declaration contemplated in article 9 entails that once an organisation is

[241] *Trial of the Major War Criminals before the International Military Tribunal Volume XXII,* (1948) 465.
[242] Para 1 of art 9 of the Charter of the IMT.
[243] Article 10 of the Charter of the International Military Tribunal provides that "In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have right to bring individual to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned."

declared as a criminal organisation – such declaration is final. That is, the criminal nature of such organisation is deemed proved and no questions may be raised in that regard. The consequences that ensued as a result of the declaration includes that national authorities were vested with powers to prosecute and punish "individuals for membership" in such criminally declared corporations. In this context, membership into a criminally declared organisation was an offence that attracted personal liability.

Hopeful to these provisions, coupled with sweeping prosecutorial powers to charge conspiracy to commit atrocities, Robert H. Jackson at the realm of the prosecution team elucidated that the prosecution's task was twofold: first, it was to "[e]stablish the existence of a general conspiracy to which the Nazi Party and other organizations were parties. The second phase was concerned with the identification of individuals who were parties to the general conspiracy".[244] The impression in relation to these phases included that upon establishing that organisations were party to conspiracy to commit atrocities, it were to follow that "the evidence against individuals could be held against organizations and vice versa".[245] In the event that an organisation was declared as a criminal organisation – the following implications were probable, namely: first, it implied that members of such an organisation were by virtue of such declaration guilty and punishable for the offence of membership of a criminally declared organisation. Second, such members could be held liable for offences that were committed by such an organisation.[246] In this regard, Article 9 further provided that:

> "After receipt of the indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon

[244] Bloxham (2013) *The Journal of the Historical Association* 572.
[245] Bloxham (2013) *The Journal of the Historical Association* 573.
[246] See, G Ginsburgs & V N Kudriavtsev *The Nuremberg Trial and International Law* (1990) 215 posits that "once the conspiracy is established, each act of every member thereof during its continuance and in furtherance of its purposes would be imputable to all other members."

> the question of the criminal character of the organisation. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard."[247]

The text of this provision entails that, the constitutive instrument of the IMT provided for the rights and procedures that were available to a member of a group or organisation. For instance, "[a] member of a group was entitled to bring an application before the Tribunal for leave to be heard in relation to the question of the criminal character of the organisation."[248] The provisions that contemplated to provide for corporate criminal liability presented challenges. These challenges, among others included that, apart from the interpretation that "[i]ndividual members of organizations declared criminal could themselves be convicted on the basis of membership therein; the penalty for crime of membership was to be made in terms of the Control Council Law 10, which authorized capital punishment."[249] The problem here was that a person who may have joined the group without having knowledge that the group's object was to commit atrocities would have been subjected to injustice. Equally so, members who were conscripted into the organisation were without protection. In other words, the provisions had far-reaching consequences without safeguards for purposes of ensuring that innocent members (i.e. morally blameless) were not prejudiced.

The other concern was that the provisions reversed the onus in relation to proving that such members may have joined the organisation involuntarily (claim of conscription). Resulting from these limitations the corporate liability scheme was vigorously challenged by the defence counsel. Ginsburgs and Kudriavtsev summarised the defense counsel's main objections to include that - "collective criminal responsibility is a denial of justice and violates

[247] Para 2 of art 9 of the Charter of the IMT.

[248] See, Bloxham (2013) *Journal of Historical Association* 574.

[249] Taylor *Anatomy of the Nuremberg Trials* 283; Ginsburgs et al *Nuremberg Trial* 242; R K Woetzel *The Nuremberg Trials in International Law* (1960) 191 posits that "the court thereby showed that the declaration of criminality could have serious consequences and could result in the imposition of death penalty for the crime of membership in such organization. Further that the procedure was novel and its application unless properly safeguarded may produce great injustice."

international law; the Charter imposes punishment retrospectively upon membership in groups that were not prohibited by law; and the fact that individual members were labelled criminals without a hearing".[250]In response to these objections, the IMT held that:

> "(…) if satisfied of the criminal guilt of any organization or group, this Tribunal should not hesitate to declare it to be criminal because the theory of group criminality is new, or because it might be unjustly applied by some subsequent tribunals. (…) the Tribunal should make such declaration of criminality as far as is possible."[251]

The tribunal made comparison between a criminal organisation and criminal conspiracy. The tribunal stated that they are both concerned mainly with cooperation for criminal purposes. Despite the tribunal taking the above stated position, it however observed that to avoid the irreparable injustice against innocent members of the organisations that are declared criminal, there must be safeguards or mechanisms that must be put in place to separate the innocent from the guilty members. In this regard, the Tribunal continued with caution and held that:

> "[S]ince the declaration with respect to the organization and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless *such* members were personally implicated in the commission of the acts declared criminal by article 6 of the Charter as members of the organization. Membership alone is not enough to come within the scope of these declarations."[252]

To this effect the tribunal laid down certain requirements which must be satisfied before declaring organisations as criminal organisations. In the similar manner, the requirements which ought to be proved before a member of the group could be held accountable for the

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[250] Ginsburgs et al *Nuremberg Trial* 240.
[251] *Trial of the Major War Criminals Before the International Military Tribunal,* IMT Vol XXII 500.
[252] *Trial of the Major War Criminals Before the International Military Tribunal*, IMT Vol XXII 500.

offence of membership of a criminally declared organisation were prescribed. These requirements included: *first*, the group or organisation must be formed or used in connection with any act proscribed by "article 6 of the Charter of the IMT" of which the individual may be convicted. The measuring yard stick for this requirement was that in order for an organisation to be declared criminal it must have been proven beyond reasonable doubt that the group or organisation "really acted as a group or organization towards the common plan (commission of atrocities)."[253]

Second, was the voluntary aspect of membership. Here, it was stated that a person could only be held to account, if or when such person's membership in a group was voluntary, namely: if the said person joined the group at his or her own accord. The essence of this requirement was to exclude membership that may have been resulted from conscription or involuntary mechanisms.[254] This conforms to the finding that membership alone is insufficient for purposes of prosecuting and punishing a member of a group for the crime of membership. That is, the tribunal held that criminal liability for the offence of membership may not attach, unless where the member" was personally implicated in the commission of the atrocities."[255]

Third, it was required to be proved that the design and the object of the organisation were to commit the criminal activities that were proscribed in terms of article 6 of the Charter of the IMT. *Fourth*, the object of the organisation must have been commonly known to its members. Woetzel posits that this requirement entails that "[t]he criminal purpose and activities of the organization must be widespread to an extent that they are known to all members".[256] The essence here is that any reasonable person must be able to draw an

[253] Para 519.
[254] Taylor *Anatomy of the Nuremberg Trials* 282.
[255] *Trial of the Major War Criminals Before the International Military Tribunal,* IMT Vol. XXII 500.
[256] Woetzel *Nuremberg Trials* 192.

inference in all fairness that the members of the group or organisation had knowledge of such criminal purpose.

3 2 1 2 Declaration of organisation as criminal

Despite the limited scope of the corporate scheme under the constitutive instrument of the IMT, the IMT adjudicated over organisations that were alleged by the prosecution to have been criminal in nature. Six organisations or groups were brought before the IMT to be declared criminal for their alleged complicity in the commission of atrocities. These organisations were the Leadership Corps of the Nazi Party, the *Geheime Staatspolizei* (Gestapo), the *Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei* (SS), the *Reich* Cabinet, the *Sturmabteilungen der Nationalsozialistischen Deutschen Arbeiterpartei* (SA) and the General Staff and High Command of the German Armed Forces.

The IMT declared three of these organisations as criminal organisations, namely the Leadership Corps of the Nazi Party, the SS and the Gestapo. These organisations were declared criminal because of their complicity in the commission of atrocities. For instance, in the Leadership Corps of the Nazi Party case, the tribunal found this group was, *inter alia*, instrumental and fundamental in the assisting the Nazi regime to commit atrocities in the conquered territories; the formulation of policies with the object of extermination of the German Jews; the design, formulation and implementation of slave programmes; and so forth.

The Gestapo and the *Sicherheitsdienst des Reichsführer* (SD) were treated together and the reasons for declaring them as criminal included their participation in the annihilation of the Jews, slaughters in the “concentration camps” and implementation of the slave programmes. The tribunal held that the Gestapo and SD organisations were “[i]nvolved in the persecution and extermination of the Jews, brutalities and killings in concentration camps, excesses in the administration of the occupied territories, the administration of the

slave labour programmes and the mistreatment and murder of prisoners of war."[257] In the same sense the SS was declared as a criminal organisation for similar reasons as those advanced with regard to the Gestapo and SD.

As was stated above that the reason for declaring groups as criminal organisations was to afford Allied Powers a legal and factual foundation to prosecute and punish individuals for membership in organisations that were declared criminal. Of course, as was already mentioned above, membership alone was found to be insufficient for purposes of finding an individual criminally liable for the offence of membership.[258] In order for liability in regard to the crime of membership to attach, the individual must have had personally acted or had knowledge that the organisations' object was to commit crimes that were proscribed in terms of article 6 of the Charter of IMT. It is worth noting that faced with these stringent requirements, the Tribunal, even though it declared some of the above named organisations as criminal – criminal liability only attached to the members of these organisations who were in high raking position to the exclusion of lower ranking members of same organisations. For instance among those who were excluded were cleaners, ordinary clerical personnel, stenographers and employees who performed unofficial routine works.[259]

The IMT did not declare three of the six organisations as criminal organisations for various reasons. The Reich Cabinet was essentially exonerated because there was not enough evidence to show that from the cut-off date (since 1939)[260] it had acted as a group. Further that the size of the Reich Cabinet was too small, thus, it was easier to identify the members and to institute criminal charges against the individual members, rather than declaring the

[257] *Trial of the Major War Criminals Before the International Military Tribunal,* IMT Vol. XXII 511.
[258] Para 500.
[259] Woetzel *Nuremberg Trials* 197.
[260] See, Woetzel *Nuremberg Trials* 193 stated that "[t]he IMT also limited the period of membership to which the declarations of criminality should apply. Since the jurisdiction of the court was limited by the Charter to crimes committed during the period from 1939 to 1945. (…) thus, the declaration should not apply to persons who had ceased to be members of a criminal organization before 1939."

organisation to be criminal. Equally so, the General Staff and High Command as well the SA survived the reach of the declaration.

Concerning the General Staff and High Command the tribunal found that it was composed of "[m]ilitary officers whose relationships were in general like those in other services throughout the world".[261] For this reason, it could not be said that their object was for purposes of committing offences which were proscribed by article 6 of the Charter of the IMT, nor could they qualify as a group or organisation as contemplated in terms of article 9 of the Charter of the IMT.

3 2 1 3 Observations and deductions from the IMT: The Juristic person's case

The IMT assumedly, was unique in as far as the history of international criminal law is concerned. The reason, *inter alia*, is that it was seized with a rare opportunity to lay the foundation of whether to subject body corporates to criminal responsibility for perpetration of offences. It is submitted that the drafters of the IMT constitutive instrument instead of limiting the liability to mere declaration, should rather have expanded the mode of liability to include effective punishment of corporations for their complicity in atrocities. The IMT should also have exploited articles 9, 10 and 11 (corporate scheme) to the fullest to provide for corporate criminal liability in the true sense, rather than literally interpreting the corporate scheme provision by limiting such possibility to mere declaration of the organisation as criminal. It is without doubt that there was sufficient evidence implicating organisations to have participated in the commission of atrocities.[262] However, their responsibility were immunized and reduced to mere declaration.

[261] Woetzel *Nuremberg Trials* 199.

[262] See, Bloxham (2013) *The Journal of the Historical Association* 573 stated that "In many cases the documentary evidence was clear cut, and that was particularly true of the direct participation in war crimes and crimes against humanity of SS and army leaders (Kaltenbrunner, Keitel, Jold), slave labour exploiters and plunderers."

Scholars contend that there were various explanations which were instrumental or strongly influenced the Allied powers to be reluctant or to avoid pressing for corporate punishment – notwithstanding such body corporate's participation in crimes. These factors include, notably, the lack of prescribed defences. Ginsburgs and Kudriavtsev argued that the "[t]he omission from the IMT Charter of any provision as to the defences which would be available in trials under article 10 was an excruciating blow on the prosecution."[263] Thus, it followed that there was no legal basis both under the IMT constitutive instrument or international criminal law from which the defences such as lack of knowledge pertaining to the criminal object of the corporation or involuntary membership (conscription) could be derived from. For this reason, some of the IMT judges appeared to exasperated with the notion of corporate or group criminal responsibility. During the deliberations on corporate involvement in atrocities it was stated by one judge that "[t]his group crime is a shocking thing and that all charges against organizations must be dropped."[264]

Apart from the legal considerations, there were other contributing factors such as the desire and advocacy from the Allied Powers for the restoration of Germany's economy. This was despite the fact that the moral obligation of the Allied Powers was total denazification and deindustrialization as was contemplated in terms of the Control Council Law 9. The effect thereof was to devastate or de-industrialize German corporations that benefited from atrocities such as spoliations and plunder. Bloxham observed that this Morgenthau plan was considered by other members of the Allied Powers as "impractical and immoral". And, "the plan perceived to sow the seeds of the Third World War."[265]

Further, historians argue that the fear of Soviet expansionism influenced some of the Allied Powers such as Britain to begin analysing possible avenues for the restoration of the

[263] Ginsburgs et al *Nuremberg Trial* 240.
[264] Ginsburgs et al *Nuremberg Trial* 241 makes a summary of Judge Biddle's view on corporate scheme stating that "by September 1946, he Biddle had concluded that the original recommendations of January 1945 that allowed corporate scheme was wrong and that the whole approach had to be repudiated by the Court."
[265] Bloxham (2013) *The Journal of the Historical Association* 571.

German industries. The object was that Germany would serve as the backbone of central Europe – thus, if it were to be economically resurrected, it would essentially counter the developments of the Soviet communism. For this reason, from Britain's perspective, the proceedings against industrialists and corporations were perceived to be strategically unwise.[266] Although I mention this "non-legal" reason for the non-criminalisation of corporate conduct in passing, it should not be underestimated as an overt or covert rationale for the apparent reluctance (globally) to hold companies criminally liable for atrocity offences. It is simply regarded as too costly from a geo-economic or even geo-political perspective. For now, back to the infancy of efforts to hold corporations or organisations liable for their contributions to atrocity crimes.

3 2 2 Corporate liability under the NMTs

Control Council Law 10 formed the legal source for the proceedings which were initiated against the second rank and lesser offenders including the industrialists under the jurisdictions of the NMTs. Unlike the IMT constitutive instrument, the text of Control Council Law 10 did not include corporate responsibility. However, the Control Council Law 10 provided for the offence of membership in a criminally declared organisation. It stipulated that acts that are recognized as criminal include "membership in categories of a criminal group or organization declared criminal by the International Military Tribunal."[267]

There was incontrovertible evidence pertaining to organisations' contributions or participation in crimes which were committed. These contributions included the provision of

[266] Bloxham (2013) *The Journal of the Historical Association* 576 -7 posit that "British foreign political thinking as a whole was ahead of its American counterpart, in perceiving before the end of the war the threat that Soviet expansionism was held to pose to Europe. Likewise, Whitehall was first to see that Germany would have to be resurrected in some form, as the mainstay of a central European power bloc designed to check the advance of communism. By mid-1946 this impulse had grown stronger than fears of a revival of German nationalism. Hence trials of Germany's former leaders came to be seen as detrimental to Britain's interests and particularly so if these trials concerned industrialists whose complicity in Nazi criminality could be used for anti-capitalist propaganda purposes."

[267] Art II (1)(d) of the Control Council Law 10.

vital war materials, armaments, illegally benefiting from plunder and spoliation, administration of slave programmes, deployment of inmates in factories (forced labour), and manufacturing and production of chemical "*Zyklon B* gas" and its delivery to various encampments.

The factual contribution of corporate entities in the atrocity offences and serious violations of "international humanitarian law" was recognized by the NMT's via the prosecution of individuals who were instrumental in these activities. For instance, in *United States v Alfried Krupp et al*[268] it was found that the commercial interests of the well-known German industrial firm Krupp were unlawfully and criminally served by individuals associated with this firm. The unlawful and criminal activities in question were acts of pillaging in violation of international humanitarian law, notably The Hague Regulations articles 28 and 47. In essence, these regulations provide for the protection of property rights and commercial interests in occupied territories.[269] Property in occupied territory can be seized by the occupying forces for emergencies, with the consent of the owner, or under circumstances where the defence of necessity would apply. These defences, as well as the defence's excuse of duress, were not available for the defendants in *Krupp et al*. The NMT rejected the defences and confirmed the applicable principle of individual criminal responsibility:

> "[T]he *Krupp firm*, through defendants Krupp, Loeser, Houdremont, Mueller, Janssen and Eberhardt, voluntarily and without duress participated in these violations by purchasing and removing the machinery and leasing the property of the Austin plan and in leasing the Paris property: and that there was no justification for such action, either in the interest of public order and safety or the needs of the army of occupation."[270]

[268] *US v Alfried Krupp et al*, ("*Alfried Krupp et al*") Law Reports of Trials of War Criminals Vol X (1949) 130-159 available at <https://casebook.icrc.org/case-study/united-states-military-tribunal-nuremberg-united-states-v-alfried-krupp-et-al> (accessed 2019/04/20).
[269] Apart from the Hague Rules, at present, the prohibition of pillage is also prohibited in *Geneva Convention IV* (1949) art 32(2) (for international armed conflicts) and (for non-international armed conflicts) in Additional Protocol II (1977) art 4(2)(g). See, also, M Sassòli *International Humanitarian Law* (2019) 293-294.
[270] *Alfried Krupp et al*, 130.

Significantly, for purposes of this dissertation, is the NMT's treatment of the notion of individual criminal liability. Safe to say that considering the factual matrix of the case like *Krupp et al* that the relevant crimes were "committed for the commercial benefit of the corporation."[271] Yet, the NMT adopted a liability model that excluded direct criminal responsibility for the corporation. Instead, the focus was on individuals who controlled, managed and directed these commercial entities. The NMT in *Krupp et al* took guidance from a leading American academic commentary at the time:

> "Officers, directors, or agents of a corporation participating in a violation of law in the conduct of the company's business may be held criminally liable individually therefore. [...] He is liable where his [...] authority is established, or where he is the actual present and efficient actor. When the corporation itself is forbidden to do an act, the prohibition extends to the board of directors and to each director, separately and individually."[272]

Van Der Wilt opined that these corporate contributions present a "[s]ymbiotic relationship between corporate activities and the criminal regime, in which relationship the latter could not survive without the corporations' unfaltering support."[273] The non-incorporation of direct corporate scheme in the text of the Control Council Law 10 and the jurisdiction of the NMTs prompted the NMTs to place its reliance on the principle of individual criminal liability even though the criminal conduct clearly benefitted the corporate entity. Nevertheless, this step towards holding corporations responsible for atrocity crimes, albeit indirectly via the application of individual criminal responsibility of the directors, managers and senior members, constituted an important moral victory.

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[271] There was evidence which suggested that Krupp firm benefited from the sale of various war materials that supported the Nazi regime.
[272] The NMT quoted from *Corpus Juris Secundum*, Vol 19 (1940) 363.
[273] Van Der Wilt (2013) *Chinese Journal of International Law* 52.

3 3 Jurisprudence from the ICTY and ICTR

The discussion in the preceding section analysed the principle of corporate criminal responsibility from the IMT and NMTs perspectives. In this section, the object is to analyse the criminal liability of body corporates – with specific focus on the *ad hoc* UN tribunals; the ICTY, and ICTR.

3 3 1 Overview on establishment of ICTY and ICTR

Needless to state that the ICTY[274] and the ICTR,[275]even though they are distinct from each other, are creatures of their constitutive instruments and were created with the object to put an end to impunity for atrocity crimes which were committed in the Former Yugoslavia and Rwanda respectively. From the onset, it must be explained that these tribunals are discussed together under this section because their respective founding statutes are substantively identical.

3 3 1 1 Establishment of ICTY

The aftermath of the Cold War witnessed the fall and disbanding of the former Socialist Federal Republic of Yugoslavia (SFRY). Behind this disbandment was the quest for the constituent states of SFRY which sought independence and self-determination. This endeavour led to the conflict that were characterised as having both "international and

[274] See, Statute of ICTY adopted on 25 May 1993 by the United Nations Security Council (UNSC) Resolution 827 as Amended on 13 May 1998 by UNSC Resolution 1166 and Amended on 30 November 2000 by UNSC Resolution 1329, the Preamble provides that " Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (…)."

[275] See, Preamble of the Statute of the ICTR which provides that " Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of persons for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (…)."

internal conflict dimensions."[276] A Commission of Experts was setup at the instance of the United Nations Security Council (UNSC) with the object to determine the veracity of the atrocities that were committed in the territory of SFRY.[277] The investigation revealed that there were "[w]idespread violations of grave breaches and other violations of international humanitarian law, among others, these violations included mass wilful killing, ethnic cleansing, and pillage, torture and destruction of cultural and religious property."[278] Culminating from this investigation the recommendation was that a tribunal must be created either based on treaty or resolution of the UNSC.[279] Consequently, by virtue of the UNSC Resolution 827 of 1993, the ICTY was established to prosecute and punish persons who participated in the commission of atrocities offences in SFRY.[280]

3 3 1 2 Overview on the establishment of ICTR

Distinguished from the conflicts that occasioned in SFRY, the creation of the ICTR culminated not because of the quest of independence and self-determination for the Hutus neither for the Tutsi. The conflict in the territory and neighbouring states of Rwanda by Rwandans was not *per se* classified as containing international elements (to justify UNSC's intervention) but it was classified as an internal conflict which nevertheless posed a "threat to international peace and security"[281], thus justifying UN action.[282]

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[276] S Williams *Hybrid and Internationalized Criminal Tribunals: Selected Jurisdictional Issues* (2012) 31.
[277] Para 2 of the UNSC Resolution 780 of 1993 UN Document S/RES/780.
[278] See, UNSC Interim Report of the Commission of Experts established in terms of UNSC Resolution 780 of 1992 UN Document S/25274; See further, UNSC, Final Report of the Commission of Experts established in terms of UNSC Resolution 780 UN Document S/1994/674; Williams *Hybrid and Internationalized Criminal Tribunals* 31.
[279] See, UN Document S/25704; Williams *Hybrid and Internationalized Criminal Tribunals* 32 "The Secretary General had recommended that the tribunal be established by a resolution rather than by treaty, as the treaty process would be too lengthy and would not guarantee that the state affected would become parties thereto."
[280] See, UNSC Resolution 808 (1993) establishing the Statute of the ICTY and 827 (1993) UN Document S/RES/827.
[281] Williams *Hybrid and Internationalized Criminal Tribunals* 34.
[282] For this reason the UNSC had basis to intervene. The UNSC intervention included the establishment of a Commission of Expert in terms of the UNSC Resolution 935 (1994) UN Document S/RES/935 with powers and authority to investigate and obtain evidence of these atrocities; Williams *Hybrid and Internationalized Criminal Tribunals* 33 expound that "by the time the killing ended in July 1994, between 500,000 and 1,000,000

An investigation team was constituted, comprised of experts, with the mandate of obtaining evidence of the atrocities that were "[c]ommitted in the territory of Rwanda and neighbouring states by Rwandans."[283] The report of the Commission of Expert revealed that there was "evidence that genocide had occurred and other widespread, systematic violations of international humanitarian law."[284] This, in a nutshell, was the legal and factual foundation establishing the ICTR.[285]

3 3 2 Competence and jurisdiction of the ICTY and ICTR

The ICTY and the ICTR were both conferred with the competence to hold accountable persons who participated in the atrocity offences as was proscribed by the establishing instruments (statutes).[286] The competence of the tribunals as to the temporal, material, geographical and personal jurisdiction was determined within the four corners of the foundational statutes. With reference to competence, the ICTY, in *Prosecutor v Dusko Tadić and Goran Borovnica*[287] ("*Dusko & Goran*") declared that:

> "The competence of this International Tribunal and hence of this Trial Chamber is determined by the terms of the Statute."[288]

Tutsis had been massacred and between 10,000 and 100,000 Hutus had been killed in the Rwandan Patriotic Force (RPF) counter-offensive."

[283] The indictment stretched to include acts that were committed outside Rwanda but which had impact on Rwanda.

[284] See, the Special Rapporteur Report on Situation of Human Rights in the Territory of Rwanda transmitted to the United Nation Commission on Human Rights (Res S-3/1) and the Economic and Social Council Decision 223 (1994) UN Document A/49/508-S/19941157.

[285] The establishment of the ICTR was executed in terms of the UNSC Resolution 955 of 1994 dated 8 November 1994.

[286] Statute of the ICTY provides for – art 2 Grave breaches of the Geneva Convention of 1949, art 3 Violations of laws or customs of war, art 4 Genocide, and art 5 Crimes against Humanity; Statute of the ICTR provides for – art 2 Genocide, art 3 Crimes against Humanity, and art 4 Violations of article 3 common to the Geneva Conventions and of Additional Protocol II.

[287] IT-94-1-T Opinion and Judgment of the Trial Chamber II by Judges McDonald, Stephen and Vohrah dated 7 May 1997.

[288] Para 558.

In this breath, the ICTY's competence scheme was limited to the prosecution and punishment of perpetrators of atrocity offences which occurred effective from 1991 in SFRY.[289] In contradistinction, the ICTR was conferred with competence to prosecute not only the authors of atrocity crimes in Rwanda, rather it included criminal conduct that were perpetrated outside Rwanda and which acts had detrimental impact on Rwanda.[290]

Deducing from the text of these statutes, it is apparent that these statutes in their competence provisions refer to the concept of "persons", without qualifying or limiting it to natural or juristic persons. Without first disqualifying either of the forms of persons (juristic or natural person), the impression on the face of the competence provisions may imply inclusivity of all forms of persons. However, an holistic reading of the foundational statutes demonstrates that these tribunals lack competence or jurisdiction over juristic persons.

The tribunals lacked competence to prosecute and punish corporations for corporate acts that may be deemed or qualify as atrocity crimes. *Firstly*, the exclusion of corporate criminal liability is expressly provided for in article 6 of the ICTY Statute, and similar provision exists as per article 5 of the ICTR Statute which specifically proffer that the respective tribunals "have jurisdiction over natural persons."[291] *Secondly*, and in further support of the explicit provision concerning the exclusion of liability of body corporates, both these Statutes provide as follows:

> "[A] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in article (*ICTY – article 2 to 5 and ICTR – article 2 to 4 respectively*) of the present Statute, shall be individually responsible for the crime."[292]

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[289] Art 1 of the Statute of the ICTY.

[290] See, article 1 of the Statute of the ICTR.

[291] Art 6 of Statute of ICTY; Art 5 of the Statute of the ICTR – The contents of these provisions are identical save for the mention of 'Rwanda' in article 5 of the Statute of ICTR. Above all they provide that "The International Tribunal (for Rwanda) shall have jurisdiction over natural persons pursuant to the provisions of the present Statute."

[292] Art 5 (1) of the Statute of the ICTY; Art 6 (1) of the Statute of the ICTR.

It is notable that throughout the deliberations and drafting process of the ICTY's founding statute, the French Government mooted, without garnering enough support, the inclusion of the offence of membership in a group or organisation. The French proposal provided that "membership in a *de jure* or *de facto* group whose primary or subordinate goal is to commit crimes coming within the jurisdiction of the Tribunal would constitute a specific offence."[293] The effect, at least in theory, would be to make allowance for corporate liability in the text of the Statute of the ICTY – akin to the corporate liability that was constructed via the constitutive instrument of the IMT Nuremberg.[294]

The French corporate liability proposal did not receive the necessary support for its inclusion in the final text of the ICTY's founding statute. Among the reasons that caused the refusal of the (in)famous French proposal was that the earlier criminal tribunals, for instance the Nuremberg tribunals, were not solid historical precedents for corporate criminal liability in the proper sense (despite the IMT's jurisprudence regarding criminal organisations, as discussed earlier). The French proposal would also be at odds with the sentencing scheme that contemplated imprisonment without option of payment of a fine as the appropriate sentence for atrocity crimes.[295]

In its application of the statute, the ICTY certainly viewed personal liability for atrocity crimes to be, first and foremost, the responsibility of *natural* persons. In *Prosecutor v Dusko Tadić and Goran Borovnica*[296] *("Tadic and Borovnica")* the Tribunal cited with approval the IMT phrasing that "criminal liability for international crimes" is *individual* liability. ICTY held that "the Nuremberg Tribunal considered a number of factors relevant to its conclusion that

[293] United Nations Document S/25266, French Proposal (from the Permanent Representative to the United Nations) – letter dated 10 February 1993.
[294] J R W D Jones *The practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (1998) 61.
[295] Article 24 of the Statute of the ICTY; Article 23 of the Statute of the ICTR.
[296] IT-94-1-T Appeals Chamber Decision on Defense Motion for Interlocutory Appeal on Jurisdiction dated 2 October 1995.

the authors of particular prohibitions (international crimes) incur individual responsibility."[297] The language observed in the statutes of the two *ad hoc* tribunals', when interpreted against the background of the historical Nuremberg legacy, led to the predictable outcome that institutional international criminal law was not yet ready for holding corporations responsible for atrocities.

On the face of it, the emphatic rejection of corporate criminal liability as a model of attributing liability by both the drafters and the interpreters of the *ad hoc* tribunals' statutes may very well signal the end of the debate. However, beyond the positive law and drafting history, what were the factual situation on the ground in terms of corporate involvement in the atrocity crimes that were committed in Rwanda and in the Balkans? Is there enough of a factual matrix to at least debate the issue beyond the positive law and with an eye on the potential trajectory which could, one day, lead to institutional and legal support for the notion of corporate criminal liability for atrocity crimes at the international level? In the discussion below, an attempt is made to establish whether there were avenues, other than the constitutive statutes, which were open to the ICTY and ICTR to apply and develop the principle of corporate criminal responsibility. The points of departure is to briefly ponder around issues to whether body corporate had a stink (involvement) in the atrocity crimes (or, at least *prima facie* indication of corporate involvement that would warrant further debate of this issue).

3 3 3 Corporate complicity in atrocities: the Balkans and Rwanda standpoints

A more detailed survey of corporate complicity in atrocities is provided in chapter 4 below. For now, it is worth to survey possible the companies' involvement in atrocity offences committed in Rwanda and in the Balkans. Observed from the standpoint of the ICTY and ICTR it appears that the body corporate's hands in atrocity crimes cannot be denied. The

[297] *Tadić and Borovnica* at 128.

tribunals acknowledged these body corporates' involvement in atrocity offences. However, because of the rigid application of the individual criminal liability principle, corporations and other collectives went unpunished. The principle of corporate/group criminal liability was excluded in cases such as the participation of Kangura newspaper, Arkan's Tigers consortium, the *Interahamwe* of Rwanda, and the *Radio Television Libre des Mille Collines* (RTLM). These collectives-*qua*-collectives essentially went unpunished.

In relation to the Arkan's Tiger in the Former Yugoslavia, the group was formed by Željko Ražnatović alias Arkan and it consisted of Serbian volunteers who became to be known as Arkan's Tigers. The object of the group was to protect and defend the interests of Serbians who lived outside Serbia and within Yugoslavia. It operated under the shadows of the Serb Military. By this association with the Serb Military, the Arkan's Tigers committed atrocities among others including torture, looting of property, rape, and murder in Bosnia, Croatia and Kosovo.[298] However, the Arkan's Tigers as a group was not declared criminal. None of the members of the Arkan's Tigers were prosecuted for these atrocities, except for Željko Ražnatović who was indicted for atrocities that he personally committed.[299] Equally, and despite the proven active participation in the commission of genocide and other international crimes, the *Interahamwe* group,[300] *Kangura* Newspaper (print media)[301] and the RTLM[302] in Rwanda enjoyed impunity for the perpetration of international crimes.

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[298] E Pond "Kosovo and Serbia after the French Non" (2005) *Washington Quarterly* 19 20.

[299] *Prosecutor v Željko Ražnatović ("Željko")* IT-97-27. Arkan was indicted, however, he was killed in 2000 in Belgrade and did not stand trial.

[300] *Prosecutor v Juvénal Kajelijeli* ("*Juvénal*") Case No. ICTR-98-44A-T Judgment and Sentence of 1 December 2003, paragraph 83 "the Chamber is aware that based on the notoriety of the word Interahamwe a witness when testifying in court may use the word with reference to either the particular group that existed in Mukingo Commune and neighboring areas or the general term used by the populace which means genocidaires or killers."

[301] *Prosecutor v Ferdinand Nahimana, Jean Bosco Barayagwiza and Hassan Ngeze* ("*Nahimana* et al") Case No. ICTR-99-52-T Judgment and Sentence of Trial Chamber I on 3 December 2003, paragraph 11 the indictment read "Hassan Ngeze stand charged mainly in relation to newspaper *Kangura.*" At paragraph 1038 the Trial Chamber held that "(…) it is evident that *Kangura* (Newspapaer) played a significant role, and was seen to have placed a significant role, in creating the conditions that led to acts of Genocide."

[302] Para 8 reflects that Ferdinand Nahimana was indicted to stand trial mainly in relation to the participation in the commission of atrocities by the Radio Television Libre des Mille Collines (RTLM). At paragraph 486 the Chamber found that "[R]TLM broadcasts engaged in ethnic stereotyping in a manner that promoted contempt

The role played by these groups or corporations in the build-up and eventual commission of genocide against the Tutsi in Rwanda was found to be significant, for example on the role played by the RTLM, the Tribunal found that:

> "(…) RTLM also broadcast messages encouraging Tutsi civilians to come out of hiding and return home or go to the roadblocks, where they were subsequently killed in accordance with the direction of the subsequent RTLM broadcasts tracking their movements."[303]

In this instance, because of the broadcasts calling on Tutsis to come out of hiding, those in hiding would possibly not have been killed. This was a clear strategy deployed by the RTLM to ensure the extermination of the Tutsis, which strategy was approved by the management of RTLM. Therefore, in this context, the principle of individual criminal liability unlike corporate criminal liability appears to be insufficient for purposes of deterring corporate conduct that may be deemed criminal.

It is argued that taking into consideration the evolution of corporations, their power and influence in social sphere and the rights conferred on them, not only do they require corresponding obligations, but that they also require appropriate sanctions to ward-off the conduct that may be deemed criminal. Atrocity crimes don't occur in a vacuum, or without considerable organisational support. Individuals alone did not out of their own volition decided to commit these atrocities in the Balkans and in Rwanda. A certain context and atmosphere were created by a complex of role-players, not least of all institutions (often in the private or semi-private sphere) that propagated hateful ideas and atrocious intentions. A mix of individual and corporate actors[304] contributed substantially in the build-up to the genocide in Rwanda. However, the veracity of these contributions is not reflected in the body

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and hatred for the Tutsi population. (…) the virulence and the intensity of RTLM broadcasts propagating ethnic hatred and calling for violence increased. The broadcasts called explicitily for the extermination of the Tutsi ethnic group."

[303] Para 487.

[304] For an overview, see the Human Rights Watch report, available at: <https://www.hrw.org/reports/1999/rwanda/Geno4-7-03.htm> (accessed on 2019/03/18).

of cases that were heard by the ICTR. Chief reasons for this was due to the jurisdictional limitation regarding individual criminal liability.

3 4 Jurisprudence from SCSL

In this section, the discussion focusses on the jurisprudence from the SCSL. The SCSL, by far can be contrasted from other *ad hoc* ICTs discussed above. Notably, because the SCSL was not limited to apply its constitutive instrument – rather, it was allowed or permitted to apply domestic laws. This placed the SCSL, theoretically, in a better position to apply corporate criminal liability because Sierra Leonean Criminal Procedure Act of 1965, as is demonstrated below, provides for a corporate scheme to criminally sanction body corporates for offences.

3 4 1 Overview on the establishment of SCSL

The establishment of the SCSL culminated after the conflict that was contested by the government forces of Sierra Leone which went *barrel for barrel* with the rebel *militia*, namely: Revolutionary United Front (RUF). The RUF was under the leadership of Foday Sankoh. The conflict was characterized as a civil war through which RUF intended to overthrow the government. The civil war led among others to killings, murders, displacements, recruitment of children as soldiers, looting of civilian properties, raping of women and girls, sex slaves and amputations.[305] The RUF attacks were repelled by the "international pressure and military interventions by the Economic Community of West African States (ECOWAS)."[306]

Following the atrocities that were committed and with the object to bring an end or thwart impunity for the perpetration of core offences, President Kabbah forwarded the request for intervention to the UNSC for assistance in establishing an independent tribunal sought to bring to justice persons who participated in the atrocity offences that occasioned in Sierra

[305] Williams *Hybrid and Internationalized Criminal Tribunals* 67.
[306] Williams *Hybrid and Internationalized Criminal Tribunals* 66.

Leone. In support of his request, President Kabbah indicated that a number of considerations was required to be taken into account, *inter alia*, "[the nature and extent of the atrocities committed; Sierra Leone's lack of resources to mount and sustain the anticipated trial; as well as lack of expertise to bring to justice those who were responsible for committing the atrocities."[307]

After the negotiations between the Sierra Leone government and the UN, an agreement to establish the SCSL with object to bring to justice those responsible for atrocities was concluded.[308] To this effect the SCSL had an intermingling of "international and domestic" legal flavour. That is, as Williams puts it "the SCSL exists as a distinct institution, separate from both the United Nations and the National legal system."[309] The SCSL had the mandate, without limitation, to consider the referencing the international rules and in addition the rules culminating from Sierra Leone. It cannot be overstated that the domestic law of Sierra Leone included the Criminal Procedure Act 1965. The import of this legislation will be showcased in the analysis below.

3 4 2 Competence and personal jurisdiction of SCSL

The competency of the SCSL is embedded in terms of the SCSL constitutive Statute. Article 1 confers SCSL with the powers to adjudicate over offenders and it provides that the court "have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leone law committed in the territory of Sierra Leone (…)."[310] The competency provision makes reference to the word 'person'

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[307] Sierra Leone Presidential Letter to UNSC President dated 12 June 2000 UN Document S/2000/786.

[308] UNSC Resolution 1315 of 2000 UN Document S/RES/1315; See, article 6 of the Agreement Between the UN and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone dated 16 January 2002; Williams *Hybrid and Internationalized Criminal Tribunals* 69 posits that "unlike the ICTY and the ICTR, the SCSL was to be funded by voluntary contributions from member states of the United Nations, and not from the normal United Nations budget."

[309] Williams *Hybrid and Internationalized Criminal Tribunals* 70.

[310] The Statute of the SCSL – Article 1(1) the court's competency includes atrocities committed "since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone; and in terms of article 1(2) the court have competency for any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant

without distinction between natural and juristic persons. In the entire Statute of the SCSL, the word 'person' is not qualified, when compared with other statutes.[311] In the ICTY and ICTR Statutes, there is express reference from which reasonable inferences may be drawn that the word 'person' in the context of ICTR and ICTY means 'natural person' – which qualification may from the onset exclude the possibility of including the liability of a body corporate in the jurisdictions of the ICTR and ICTY.

The non-qualification of the word person in the Statute of the SCSL was described by Schabas as an indication of the willingness to bring to justice corporate bodies. In this regard Schabas observed that:

> "[T]he Report of the Secretary-General on the draft statute of the SCSL provides no explanation as to why this provision (*jurisdiction over natural persons*) was not included. This rather surprising given that the SCSL Statute is undoubtedly modelled on the other two statutes (*ICTY and ICTR*). Perhaps it reflects a specific interest in corporate liability within the Sierra Leone Conflict or alternatively, a more general growing concern with financial actors in armed conflicts."[312] Emphasis added in brackets.

However, despite this opportunity, the SCSL exercised jurisdiction over offenders who were natural persons to the exclusion of companies. In this manner, the SCSL, like other tribunals which existed before it, adopted the "*individual criminal liability*" as its functional liability model.[313] For this reason the jurisprudence of the SCSL followed those of the IMT, ICTY and ICTR.

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to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State."

[311] Art 5 Statute of ICTR; Art 6 Statute of ICTY which provides that "(…) Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute."

[312] W A Schabas *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (2006) 139.

[313] Art 6 (1) of Statute of SCSL provides for individual criminal liability and that "a person who planned, instigated, ordered, committed or otherwise aided and abated in the planning, preparation or execution of a crime referred to in article 2 to 4of the Statute shall be individually responsible for the crime"; article 1(5) of the

It is argued that the SCSL was not only presented with the competency provision that did not distinguish between natural persons and juristic persons, but that there were other opportunities which were supposed to be explored that would have led to the trial of corporations for their complicity in atrocity offences. In this context, the applicable law under SCSL was not only limited to the SCSL Statute, jurisprudence of the ICTR[314] and international law, but rather, the SCSL Statute made allowance for the court to apply the domestic laws. Thus, the judges of the SCSL would have been "guided, as appropriate, by the Criminal Procedure Act[315] of Sierra Leone."[316] The Sierra Leonean Criminal Procedure Act, 1965 does not define the term 'person', however, it provides a definition of 'accused' which means "a 'person' charged with a crime but does not include defendant."[317] The importance of this definition of 'accused' is that it is inclusive of both natural and juristic persons.[318]

This proposition resonates in the fact that the Sierra Leonean Criminal Procedure Act of 1965 under Part V section 206 to 209 provides for corporate prosecution and punishment. Moreover, it proffers that "[a] corporation may be charged either alone or jointly with another person with an offence triable on indictment or triable summarily before a Magistrate's Court".[319] Therefore, national laws allowed corporate criminal liability, however, there were no corporations or organised groups that were brought before the SCSL to be arraigned for

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Statute of SCSL provides that "Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone."

[314] Art 14(1) of the Statute of the SCSL provides that "The Rule of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis to the conduct of the legal proceedings before the Special Court."

[315] Act No. 32 of 1965 Assented to in Her Majesty's name on the 6th day of October 1965 and interred into force being an Act to Consolidate and Amend the Law Relating to Criminal Procedure on 7th October 1965.

[316] Art 14(2) of the Statute of the SCSL provides that "the judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone."

[317] Sect 2 of the Criminal Procedure Act, Act 32 of 1965 of Sierra Leone.

[318] Corporation is defined under Sect 2 of the Criminal Procedure Act of 1965 to include "a statutory corporation as defined in subsect (9) of sect 32 of the Constitution, a company formed and registered under the Companies Act or the Companies Act, 1924, and any Company to which Part IX of the Companies Act applies."

[319] Sect 207(1) of the Criminal Procedure Act, Act 32 of 1965 of Sierra Leone.

their complicity in the commission of atrocity crimes. Chief reason for not prosecuting corporations was not because corporations did not participate in the commission of atrocities, rather it was because of the adopted jurisprudence from the earlier international criminal tribunals which favoured the principle that criminal liability for atrocity crimes should, in principle, rests with individual (natural) persons.

It is pointed out here, that the SCSL had a better opportunity, because of existing legal avenues, to advance the course of corporate criminal liability, if attempts were made to indict corporations or organised groups, including the Executive Outcomes Security Company, the RUF, and others for their complicity in atrocities that were committed in Sierra Leone.[320] To buttress this submission a discussion that follows highlights the involvement of corporations in the Sierra Leone conflict.

3 4 3 Corporate complicity in Sierra Leone – a brief overview

The RUF (an organisation under the leadership of Foday Sankoh) announced its intention to overthrow the Sierra Leone government that was led by the All People's Congress Party (APC) by means other than the precepts acceptable in normal democracies. The RUF opted to use other means than by taking over governance through elections.[321] The RUF merged with the Armed Forces Revolutionary Council (AFRC) and their strategies and policies promoted the use of violence against the government of Sierra Leone and the civilian population. In *Prosecutor v Charles Ghankay Taylor*[322] the SCSL found that:

> "Throughout the indictment period the operational strategy of the RUF and AFRC was characterised by a campaign of crimes against the Sierra Leonean civilian population, including murders, rapes, sexual slavery, looting, abductions, forced labour, conscription of child soldiers,

[320] For a discussion of the involvement of companies like Executive Outcomes in conflicts and atrocities in Africa and elsewhere, see J Harding "The mercenary business: Executive outcomes'' (1997) *Review of African Political Economy* 87-97.
[321] Williams *Hybrid and Internationalized Criminal Tribunals* 65.
[322] SCSL-03-1-T Judgment Summary of 26 April 2011.

amputations and other forms of physical violence and acts of terror. These crimes were inextricably linked to how the RUF and AFRC achieved their political and military objectives."[323]

The policies of RUF and AFRC were drafted in different forms, for instance the court established that these organizations held operations that were titled "Operation No Living Thing", "Operation Spare No Soul" and "Operation Pay Yourself". These operational strategies were a form of direct orders to militia members, as a result the members of RUF and AFRC committed atrocities against civilian and the government. The intention of these RUF and AFRC as the court found, was explicitly made and it included to permeate a crusade of dread disdain against non-combatants. This was the explicit strategy which formed part of RUF and AFRC's war strategy.

Apart from the rebellious group discussed above (the RUF), there were also private security companies that were contracted by the Sierra Leonean government for purposes of subduing the conflict. The contribution to the conflict by the instrumentality of private security companies, notably, the Executive Outcomes Protection Services and Sandline Security made possible many of the reported atrocities in Sierra Leone.[324]

At this juncture a distinction between two classes of corporate complicity is made. The *first* class refers to corporations that act or commit atrocities without having been contracted by government. The *second* class refers to corporations that are contracted by government but whose conduct are nevertheless deemed criminal. Regarding the first category of corporate actors, it should be clear that, in principle, the corporate actor should be liable for its own actions. The second category of corporate actors requires more explanation, in the sense that, the second category of corporate actors may be treated as instruments, subjects or organs of the contracting state. As such, their conduct (commission of atrocities) may be

[323] Para 150.

[324] Williams *Hybrid and Internationalized Criminal Tribunals* 65 -70; I Douglas "Fighting for diamonds – Private military companies in Sierra Leone" in J Cilliers & P Mason (eds) *Peace, Profit, or Plunder: Privatization of Security in War-torn African Societies* (1999) 175 – 200 at 179 -192.

attributed to the contracting State. For instance, in this context, the acts of Executive Outcomes Protection Services that ensued by virtue of their contracts for security services with the Sierra Leonean government may be deemed as authored by the government of Sierra Leone. Therefore, any liability which those acts attract may equally be attributed to the Sierra Leone Government.

This bring to the fore the principle of "state responsibility", which is squarely found outside the purview of this dissertation but may well be noted here to delimit genuine corporate responsibility from state responsibility or quasi-state responsibility. The test for responsibility under this circumstance as was stated in *Bosnia and Herzegovina v Serbia and Montenegro*[325] ("*Bosnia and Herzegovina*") entails the determination of whether:

> "[F]irst (…) the acts committed were perpetrated by organs of the Respondent (State), i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, *then the second question is*, it should be ascertained whether the acts in question were committed by persons who, while not organs of the State, did nevertheless act on the instructions of the direction or control of, the State."[326] (Emphasis added in italics)

The first leg of the state responsibility test may be answered in the negative when applied to the situation in Sierra Leone. The reasons, being, *inter alia*, that the Executive Outcomes Protection Services or the Sandline Security Company did not form part of the organs of the government of Sierra Leone.[327] In contradistinction, the second leg of the test, may be answered positively. The basis being that, though these security companies were independent entities and as such could not be construed as part of the organs of government

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[325] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Report Case No. 91 Judgment of 26 February 2007.

[326] *Bosnia and Herzegovina* paras 384 – 385; H Strydom "The Srebrenica genocide and the responsibility of states and international organizations" (2008) *3 TSAR* 499 503.

[327] The Constitution of Sierra Leone Act 6 of 1991, organ of state refers to the Executive as provided in Chapter V, Legislature as provided in Chapter VI and the Judiciary as provided in Chapter VII.

– they however "acted under the instructions, direction or control"[328] of the Sierra Leonean government. This is consistent with the requirements laid down in the *Articles on the Responsibility of States for Internationally Wrongful Acts* which provide that:

> "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[329]

It is worth to note the control test in this context. For liability to be attributed, the requirement that should be met, include proving that there was "effective control." The effective control test was applied in *Case Concerning Military and Paramilitary Activities in and against Nicaragua ("Nicaragua v United States of America")*[330]in which it was found that:

> "[T]he United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, (…) planning of the whole of its operation, is still insufficient in itself, (…) for purposes of attributing liability to the United States for the acts committed by contras. (…) for this conduct to give rise to legal responsibility (…), it would in principle have to be proved that the United States had effective control of the contras or military or paramilitary operations in the course of which the alleged violations were committed."[331]

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[328] They were hired by the government to provide a service.
[329] Article 8 of the Articles on the Responsibility of the States for Internationally Wrongful Acts of 2001 (UN Res 56/83 of 2001).
[330] ICJ Report No. 14 Judgment dated 21 June 1986.
[331] *Nicaragua v United States of America* para 115 and at para 277 the ICJ held that "it is Nicaragua's claim that the treatment of Nicaraguan citizens complained of was inflicted by the United States or by forces controlled by the United States. The Court is however not satisfied that the evidence available demonstrates that the contras were (controlled) by the United States when committing such acts. As the Court has indicated (paragraph 110 above), the exact extent of the control resulting from the financial dependence of the contras on the United States authorities cannot be established: and it has not been able to conclude that the contras are subject to the United States to such an extent that any acts they have committed are imputable to that State (paragraph 115 above). Even if the provision for (equitable treatment) in the Treaty is read as involving an obligation not to kill, wound or kidnap Nicaraguan citizens in Nicaragua - as to which the Court expresses no opinion - those acts of the contras performed in the course of their military or paramilitary activities in Nicaragua are not conduct attributable to the United States."

The measuring scale of "effective control test" is higher compared to the requirement of 'mere control' as was applied in *Bosnia and Herzegovina*[332] as quoted above or when compared to 'overall control test' as was applied in *Prosecutor v Tadić*[333] (*Tadić and Borovnica*) in which the Tribunal held that:

> "In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group."[334]

The Tribunal recognized that corporations or organised institutions possess different characteristics when compared to individual natural persons. These distinctive characteristics, including that associates of organised institutions may act in accord with the hierarchy and the interests of the group or policy of such a group. In contrast, an individual person may act according to his or her whims and caprices. Therefore, "for the attribution to a State of acts of these groups, it is sufficient to require that the group as a whole be under the overall control of the State."[335]

Derived from the exposition above, it is apparent that under circumstances where a government concludes a contract with private security to subdue a conflict, that corporation

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[332] ICJ Report Case No. 91.

[333] *Case No. IT-94-1-A* Judgment of the Appeals Chamber dated 15 July 1999.

[334] *Tadić and Borovnica* para 131.

[335] *Tadić and Borovnica* para 120. In the same case at para 119 the Appeals Chamber explained that "(…) when a State entrusts a private individual (or group of individuals) with the specific task of performing lawful actions on its behalf, but then the individuals, in discharging that task, breach an international obligation of the State (for instance, a private detective is requested by State authorities to protect a senior foreign diplomat but he instead seriously mistreats him while performing that task). In this case, by analogy with the rules concerning State responsibility for acts of State officials acting *ultra vires*, it can be held that the State incurs responsibility on account of its specific request to the private individual or individuals to discharge a task on its behalf." Further at para 117 the Appeals Chamber, juxtaposed the rationale for holding state liable and proffers that "The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. In other words, States are not allowed on the one hand to act de facto through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law (…)."

may not be liable for prosecution and punishment as the plea of lack of jurisdiction may suffice. However, this is not to say that the conduct of these government contracted corporations may go unnoticed, but that their adjudication may be brought in other platforms such as the ICJ, *albeit* as conduct of the state which may result in a conclusion of state responsibility. Therefore, under the second class of corporate actors stated above in this section, the SCSL would have had no jurisdiction to prosecute and punish Executive Outcomes Protection Services as a collective entity because its conduct could easily be attributed or subsumed by the government. Of course, the SCSL had no jurisdiction to try the state of Sierra Leone (only individuals).

3 4 4 Tentative thoughts on corporate liability for atrocity crimes – lessons from the ad hoc tribunals

Regarding corporate/group criminal liability, the *ad hoc* tribunals (including specialist and internationalised chambers like the SCSL) have jurisdictional limitations, but that should not be the end of the road in terms of holding corporations responsible for atrocity crimes. Indeed, there is nothing in international law that precludes the trial of corporations for atrocity offences. Considering the prevention and prosecution of a crime like genocide constitutes a *jus cogens* norm,[336] one could argue that, insofar as international tribunals lack the necessary jurisdiction, states can (some may even say *should*) step in to allowance for corporate criminal responsibility for atrocity offences at domestic criminal law.

The proposition sounds good, in theory, but as we have seen with the comparative survey of domestic systems to liability of companies: the lack of a universal approach to corporate criminal liability under national law, and some systems, like Germany, which continue to be resistant to the acceptance of genuine scheme that anticipate to criminally sanction companies. This brings us to the ICC, as a valuable vehicle for the advancement of

[336] MJ Kelly "Prosecuting corporations for genocide under international law" (2012) 6 *Harvard Law & Policy Review* 339 at 365.

corporate criminal scheme. As noted, the ICC, like its *ad hoc* counterparts, also lack jurisdiction over corporate entities. Features of the ICC can be contrasted with the other *ad hoc* tribunals – in that the ICC enjoys the status of permanence and further that it is dynamic. The Rome Statute provides for "review of the statute" (for example, the first Review Conference in 2010 in Kampala). The criticisms, lessons, and observations identified in this dissertation can therefore be utilised to build an argument for the amendment of the Rome Statute to expand its jurisdiction to include corporate entities.

3 5 Corporate criminal liability and the ICC

The discussions in the sections above analysed how the principle of corporate criminal responsibility was treated at Nuremberg, the ICTY, ICTR and the SCSL. Notably, the nature of all these stated tribunals was *ad hoc*. In this section the discussion focusses on the ICC. It includes the needs and rationale that led to setting up the ICC; the international community's debates on whether to include or exclude liability of companies from the purview of the Rome Statute of the ICC; and the dynamics at the Kampala Review Conference.

3 5 1 The need to establish a permanent International Criminal Court

The notion of establishing an international criminal tribunal came about as the result of the international community's desire to put a stop to impunity for those responsible for "the most serious crimes under international law."[337] The early conflicts that ignited the idea of creating an ICT included the atrocity committed during "First World War," the "Second World War", and decades later the conflict in the Balkans.[338] The after mass of the brutal "First World War," (WWI) culminated in the international community to conclude the Treaty of

[337] Schabas *International Criminal Tribunals* 9.

[338] A Cassese "From Nuremberg to Rome: International Military Tribunal to International Criminal Court" in A Cassese, P Gaeta & J R W D Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary Volume 1* (2002) New York: Oxford University Press, 4-9.

Versailles. This treaty sought to provide for the launch of an *ad hoc* ICT to bring to justice the authors of the mayhems that were committed during the WWI.[339] However, the envisaged ICT was not established.[340] In contrast, an ICT with the object to prosecute those responsible for the atrocities that were committed throughout the Second World War (WWII) materialised, which turn out to be famously known as the Nuremberg and Tokyo military tribunals.[341]

Several other *ad hoc* ICTs and hybrid tribunals were established thereafter.[342] These *ad hoc* ICTs shared a communal characteristic, namely, they had limited jurisdiction, in the sense that, their competences were limited and lacked universal jurisdiction.[343] Some of the factors that led to the successful creation of the ICC can briefly be summarised as follows: the aspiration to side-step the victor's justice syndrome; the desire to enhance respect for "human rights and international humanitarian law;" and to put an end to impunity for those responsible for "atrocities that deeply shock the conscience of humanity."[344] The concerted effort on the idea of creating a perpetual ICT that began with the League of Nations and continued during the UN era and which subsequently saw the joinder of Non-Governmental Organisations[345], finally resulted in the founding and lunch of the first permanent ICC with its constitutive instrument, the Rome Statute, 1998.[346]

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[339] Art 277 of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) of 18 June 1919.

[340] Cassese "From Nuremberg to Rome" in Cassese *et al* (eds) *Rome Statute* 4.

[341] Charter of the IMT; International Military Tribunal for the Far East Special Proclamation by the Supreme Commander tor the Allied Powers at Tokyo, entered into force on 19 January 1946 and as Amended on 26 April 1946.

[342] Williams *Hybrid and Internationalized Criminal Tribunals* 28-29.

[343] Williams *Hybrid and Internationalized Criminal Tribunals* 300.

[344] The atrocity crimes were branded as such, to show their grave nature, during the Nuremberg trials.

[345] K Haigh "Extending the International Criminal Court's jurisdiction to corporates: Overcoming complementarity concerns" (2008) *14(1) Australian Journal of Human Rights*, 199 200; A Clapham "MNC's under international criminal law" in M T Kamminga & S Zia-Zarifi (eds) *Liability of Multinational Corporations Under International Law* (2000)139 -195 at 157.

[346] Rome Statute of the International Criminal Court, text circulated as United Nations Document A/CONF.183/9 of 17 July 1998 and as corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002 and it entered into force on 1 July 2002.

3 5 2 Corporate criminal liability at the Rome Conference

The principle of corporate criminal liability, despite its exclusion from the jurisdictions of the earlier *ad hoc* ICTs and the hybrid tribunals, was nevertheless put on the drafting agenda at the instance of "French delegation at the Rome Conference in 1998."[347] However, as is demonstrated below, it became a bone of contention throughout the deliberations and negotiations at the Rome Conference. The debate on the inclusion or exclusion thereof brought to the fore different theories in support or negating its adoption and subsequent inclusion in the manuscript of the Rome Statute. In this regard, the Rome Conference noted that:

> "There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion (…)."[348]

The member states of the ICC that were among the debaters included states that recognize the criminal liability of corporations and those that adhere to the principle of "*societas delinquere non potest*."[349] However, even though there was an element among states of aligning the debate on corporate liability models as practiced in their own national courts (in their domestic law) – it is remarkable that states that recognized the principle of corporate criminal accountability in their domestic legal systems generally argued in favour of its adoption for purposes of the Rome Statute's modes of liability. However, one should note, states such as Australia recognize the principle of corporate criminal liability in its domestic law, but during the Rome Conference its "[o]bjection against the inclusion of

[347] An analysis on this point is made below at section 3 5 3 of this dissertation.
[348] UN Diplomatic Conference of the Plenipotentiaries on the Establishment of the International Criminal Court, "Report of the Preparatory Committee on the Establishment of an International Criminal Court" (1998) *UN Document A/CONF.183/13 Vol 3,* 31.
[349] See, a discussion on this viewpoint in chapter 2 of this dissertation.

corporate criminal liability as a mode of liability at the ICC"[350] was based not on dogmatic grounds, but rather on the challenges associated with the *enforcement* thereof.[351] And then there was the delegation from the USA, a national system that also recognizes the criminal accountability of body corporate – however, the USA, even though they were noted to have endorsed the Swedish concerns on the subject, further raised concerns regarding the lack of sufficient definition and the nature of the burden of proof that was essentially relative to corporations.[352]

The proposal that contemplated to include civil or administrative liability of corporations in the text of the Rome Statute was mooted – chief reason for this attempt was noted as for purposes of "providing a middle ground".[353] The authors of the middle ground argument were some of the states from the civil law legal systems. The practice in civil law legal systems, for instance in Germany – is that the German Criminal Code attaches administrative penalties to certain administrators and officers of corporations[354]to the exclusion of corporate criminal liability.[355] States which, for one reason or another, do not consider the principle of corporate criminal charge presume that corporations are incapable of committing crimes (they are not moral agents), hence, criminal liability is perceived to only attach to natural persons' conduct. Thus, the ascription to liability of individuals became the

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[350] UN Diplomatic Conference of the Plenipotentiaries on the Establishment of the International Criminal Court, "Summary of Records of the Meetings of the Committee of the Whole" (1998) *UN Document A/CONF.183/13 Vol 2,* 133.

[351] Page 133.

[352] Page 135.

[353]UN Diplomatic Conference of the Plenipotentiaries on the Establishment of the International Criminal Court, "Report of the Preparatory Committee on the Establishment of an International Criminal Court" (1998) *UN Document A/CONF.183/13 Vol 3,* 31 – at Footnote 71 it is noted that "(…) Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground."

[354] Kemp et al *Criminal Law* 214.

[355] Sect 14 of the German Criminal Code; G Stessens "Corporate Criminal Liability: A Comparative Perspective" (1994) 43 *ICLQ* 493 495; F van Oosten "Theoretical Basis for Criminal Liability of Legal Person in South Africa" in A Aser, G Heine & B Huber (eds) *Criminal Responsibility of Legal and Collective Entities* (1999) 195 197; Kyriakakis (2009) *Netherlands International Law Review* 333 343 – Kyriakakis posits that "German law has never recognized corporate criminal liability reflecting the view that such a principle departs from the fundamental tenets of criminal law as understood from the framework of influential 19th century philosophical traditions."

mainstay of the debate.[356] As a result it militated against the acceptance and inclusion of body corporate criminal scheme from the purview of the ICC.

3 5 3 Analysis on the French proposal on corporate criminal responsibility

The Preparatory Committee on the creation of the ICC prepared and presented a draft text of the Rome Statute to the meeting of the Committee of the Whole.[357] Notably, the draft text contemplated to include the corporate liability scheme under the jurisdiction of the ICC. The draft text intended to place the corporate scheme as a model of liability to operate alongside the principle of individual criminal liability. For this reason, the corporate scheme was provided for in terms of draft text article 23 (5) and (6) of the Rome Statute and read as follows:

> "[5. The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were on behalf of such legal persons or by their agencies or representatives.
> 6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crime]."[358]

Immediately after these provisions, what followed was a text that referred or directed the attention of the Rome Conference to two further provisions of the Draft Rome Statute, firstly, to article 76 that contemplated to deal with penalties applicable to corporations. Secondly, to article 99 that contemplated to provide for "enforcement of fines and forfeiture

[356] United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of the International Criminal Court, "Summary of Records of the Meetings of the Committee of the Whole" (1998) *UN Document A/CONF.183/13 Vol 2,* 134 "the delegation opposed the inclusion in the Statute of the criminal responsibility of legal persons, because the underlying idea of the court was individual responsibility for criminal acts."

[357] On the drafting history, see, MC Bassiouni *The Legislative History of the Statute of the International Criminal Court* (2005) Vol II.

[358] UN Diplomatic Conference of the Plenipotentiaries on the Establishment of the International Criminal Court, "Report of the Preparatory Committee on the Establishment of an International Criminal Court" (1998) *UN Document A/CONF.183/13 Vol 3,* 31. The bold text read "NB: In the context of paragraphs 5 and 6, see also article 76 (penalties applicable to legal persons) and article 99 (enforcement of fines and forfeiture measures)."

measures.[359] The analysis of the text of the draft article 23(5) entails that *firstly*, it places the principle of corporate scheme on the same footing with individual scheme.[360] *Secondly*, it expressly excluded States from the jurisdiction of the ICC. *Thirdly*, it provides for a requirement that for a corporation to be prosecuted and punished, the alleged offences should be committed on the company's behalf. On the face of this requirement, it appears that it is not limited to the theory of benefit or profiting from the crime that is been committed on its behalf. *Fourthly*, it contemplated to create an agency theory – that is, for the crime to be deemed to have been committed on its behalf, such a crime must have been committed by its agent or representative. However, it is silent to whether it refers to all the rank and file of the agents or representatives regardless of their authority or position of responsibility. For instance, could a cleaner's or low-level clerk's conduct be attributable to the corporation or only the conduct of employees in a position of control, direction, or decision-making?

In terms of the draft article 23(6), it firstly contemplated to create a possibility that the company and the servant may be charged for the same offence. This implies that, finding the corporation guilty does not bar an individual from being prosecuted for the same crime. Secondly, this provision does not appear to predicate the guilty finding of the corporation on the guilty finding of an individual natural person. The absence of clear guidelines on the determination of *mens rea* of the accused corporation was a contentious and problematic issue. The absence of clear guidelines on *mens rea* of corporations could have been cured by predicating the guilty finding against an individual natural person. This entails that if the natural person (a servant) who actually performed an act on the behalf of the corporation is found guilty, his or her *mens rea* could be construed to be the *mens rea* of the accused

[359] The bold text read "NB: In the context of paras 5 and 6, see also art 76 (penalties applicable to legal persons) and art 99 (enforcement of fines and forfeiture measures."
[360] L Van Der Herik "Subjecting corporations to the ICC regime: Analyzing the legal counterarguments" (2012) 5 available at <http://www.researchgate.net/publication/228151086> (accessed 2019/02/28); Haigh (2008) *Australian Journal of Human Rights* 202.

company. Regrettably, this was not the case under this corporate scheme as it did not predicate a guilty finding against a natural person.

The above discussed corporate liability scheme was devised and introduced by France. It transpired that the comparative law challenges were too much for the French proposal at the Rome Conference.[361] Recognising this comparative law challenge as an impediment, Ms Le Fraper du Hellen, a delegate from France, stated that:

> "(…) the inclusion of such a concept in the draft Statute had met with resistance on the part of many delegations on the grounds that either the legal systems of their countries did not provide for such a concept or that the concept was difficult to apply in the context of an international criminal court."[362]

The French delegation mooted the replacement of the draft sub-article 5 and 6 of article 23 quoted above with the organisation scheme that was enumerated in the Charter of the IMT. The French delegation stated that "the Statute should go at least as far as the Nuremberg Charter which had provided for the criminal responsibility of criminal organizations."[363] It is worth noting that the suggested corporate liability scheme which was modelled on the Nuremberg Charter included requirements such as predicating a guilty finding of natural person; a guilty finding against an organisation was espoused not to release the natural person from incurring personal liability on the same charge; a court can declare an organisation to be criminal and the declaration is final and is binding on States; corporations declared criminal were to be punished by payment of fines, forfeiture of proceeds of crimes or disgorgement.[364]

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[361] A Eser "Individual Criminal Responsibility" in A Cassese, P Gaeta & J R W D Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary Volume 1* (2002) 778-779.
[362] United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of the International Criminal Court, "Summary of Records of the Meetings of the Committee of the Whole" (1998) *UN Document A/CONF.183/13 Vol 2,* 133.
[363] Page 133.
[364] Page 133.

Modelling the corporate scheme for the Rome Statute based on the Nuremberg' organisation responsibility scheme was met with resistance, including the familiar objection that the Nuremberg prosecutions were perceived as a victor's justice, in contrast to the ICC that was to be established based on a complex international political situation where effective state cooperation and diplomacy would be paramount. Further, the purpose of the corporate scheme under the Nuremberg Charter was to prosecute and punish natural persons *qua* members of criminal organisations, and not corporations themselves.

The objections against the French delegation's main and alternative proposals were then referred to the Working Group on General Principles of Criminal Law for further consideration. The outcome and recommendations from the Working Group on the proposal is discussed below.

3 5 4 Analysis of the revised French proposal – elements reviewed

The much-revised French proposal was reflected in the following language, which would form part of the provisions contained in Part 3 (General Principles) of the eventual Rome Statute:

> "5. Without prejudice to any individual criminal responsibility of natural persons under this Statute, the Court may also have jurisdiction over a juridical person under this Statute. Charges may be filed by the Prosecutor against a juridical person, and the Court may render a judgment over a juridical person for the crime charged, if:
>
> (a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and
> (b) The natural person charged was in position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and

(c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and

(d) The natural person has been convicted of the crime charged.

For purpose of this Statute, juridical person means a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or organization registered, and acting under the national law of a State as a non-profit organization.

6. The proceedings with respect to juridical person under this article shall be in accordance with this Statute and relevant Rules of Procedure and Evidence. The Prosecutor may file charges against the natural and juridical persons jointly or separately. The natural and juridical person may be jointly tried."[365]

The French proposal, in the eyes of the pro corporate scheme was perceived as yet another golden opportunity to lay the corporate scheme foundation. The elements or requirements that are enumerated in the French proposal appear to be restrictive and may be distinguished from the main and alternative French proposal. Firstly, the concept of juridical person was defined and it disqualifies States or public bodies when exercising state authority, non-profit seeking organisation and public international bodies from being brought in the purview of the ICC. In this definition the exclusion of non-profit incorporated corporations read with the requirement of registration of juridical person, may by implication exclude the conduct of extra-legal organised groups, rebel groups, *contras,* and political parties.[366]

Although the element of making profit or obtaining benefit may be sound theory that helps to demarcate corporations from other collectives and spontaneous groups – it raises

[365] UN Diplomatic Conference of the Plenipotentiaries on the Establishment of the International Criminal Court's Working Group on General Principles of Criminal Law "Working Paper on Article 23, Paragraph 5 and 6: Draft Statute of an International Criminal Court," (1998) *UN Document A/CONF.183/C.1/WGGP/L.5/Rev.2*.
[366] Compare, for instance, the characterisation of the rebel groups instigated and financed by the defendant in *Charles Ghankay Taylor* para 150.

concerns because it has the potential to create a limitation on the jurisdiction of the ICC. For instance, the ICC's jurisdiction may be limited to corporations that may commit atrocity offences for purposes of gaining profit or benefit. It contemplates the commodification and price tagging of atrocity crimes, which seems counterintuitive if not outright wrong, at least from a moral argument perspective. The ideal situation should be as Van Der Wilt noted that "[t]he question is not whether the core crimes themselves display an economic value, but whether the supporting activities bear relation to core business of the corporations."[367] This may bring corporations such as Talisman Energy Incorporated within the purview of a morally and doctrinally defensible construction of corporate criminal liability for atrocity crimes. Talisman Energy Incorporated financed and supported military operations that causally contributed to the displacement of residents of Khartoum in quest for Talisman Energy Incorporated obtaining a concession in an oil rich part in the capital region of Sudan.[368] The point is that payment of royalties to Sudan government may form part of the core business of Talisman Energy Incorporated, rather than committing core crimes. The causal link to the atrocity was that without the payment and financing of military operations by the corporation, Talisman Energy Incorporated could not have obtained the business concession.

Paragraph 5(d) of Draft article 23 predicates a conviction of a natural person. This requirement read with paragraph 5(b) appears to be less harmful on the basis that once an individual, seized with the requisite level of authority in the firm is found guilty, then his or her *mens rea* may be ascribed to the corporation. However, difficulties may arise if paras 5(b) and (d) of Draft article 23 are read together or *in tandem* with paragraph 6 of draft article 23 which provides that charges may be brought against natural or juridical persons jointly or separately. The concern here is that the revised corporate liability scheme fails to provide

[367] Van Der Wilt (2013) *CJIL* 44-48.

[368] *The Presbyterian Church of Sudan v Talisman Energy Inc,* Case No. 07-0016-CV, Judgment 2 October 2009.

as to how such joint or separate proceedings against a corporation may be conducted. To this effect, Ms Bergman (Sweden Delegation) noted that "[t]he proposal raised practical problems in ascertaining who would represent the legal person when it is prosecuted separate from natural person on one hand, and on the other hand what would happen if the representative of the legal person was a natural person who was also indicted for the same act?."[369]

The proposal can also be faulted for its failure to recognise the generally accepted practice that duly incorporated corporations are at law regarded as equal to natural persons. That is, after all, the logic of legal personality. But rather than recognising the full consequences of legal personality proper, the revised draft text contemplated to uphold the agency theory by virtue of paragraph 5(c) of draft article 23 which requires that a charge may be put to the corporation if it is alleged that the crime was committed by a *"natural person acting on behalf of or with explicit consent"* of the corporation. The positive suggestion to cure the dependence on agency theory lies in the recognition by the international community that corporations are capable of formulating policies, making decisions and implement these policies in advancing corporate interests. Thus, these policies should be construed as corporate knowledge, objective or intention.[370] Suffice at this juncture to state that because of the reasons and observations made above on the main, the alternative and revised French proposals, the majority of the delegations could not support the inclusion of corporate criminal liability in the final text of the Rome Statute. Consequently, the French proposal was withdrawn.[371]

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[369] United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of the International Criminal Court, "Summary of Records of the Meetings of the Committee of the Whole" (1998) *UN Document A/CONF.183/13 Vol 2,* 134.

[370] Seck "Collective Responsibility" in *Accountability* 146; Van Der Wilt (2013) *CJIL* 49.

[371] United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of the International Criminal Court, "Summary of Records of the Meetings of the Committee of the Whole," (1998) *UN Document A/CONF.183/13 Vol 2,* 275.

3 5 5 Rationale for rejecting the French proposal

It is important to reflect on the main factors that predisposed the inclusion of a corporate charge, namely, the insistence on individual criminal liability as the primary mode of liability, the impact on the complementarity principle, and time constraints.

3 5 5 1 Individual criminal liability as default factor

The principle of individual criminal liability appears to have been entrenched and construed as the mainstay for establishing liability in the field of international criminal law. In contrast, corporate scheme, despite the recognition of separate legal personality of corporations in most national laws, is not widely recognized. States in which it is recognized, apply it differently and based on different notions of corporate responsibility (as pointed out in Chapter 2). By explication, it is uncontested – at least at present – that the individual criminal responsibility had been generally regarded as the backbone of criminal law at international and national level.[372] Further, while virtually all states tend to recognize individual criminal liability, in contrast, the corporate criminal scheme does not enjoy the same token of recognition or is not widely recognized. Therefore, because of this reason coupled with the proposition that international crimes cannot be committed by abstract entities (the "legacy of Nuremberg") – the principle of corporate criminal responsibility was ultimately not favourably received at Rome.

It was with ease – too simple for an answer, or too convenient – that the delegations adopted the principle of individual criminal liability. Notwithstanding the fact that the principle of corporate criminal liability was debated, even extensively, it appears that any innovative initiative that advanced any form of liability[373] other than individual criminal liability was met

[372] Eser "Individual Criminal Responsibility" in *Rome Statute of the International Criminal Court* 770.

[373] UN Diplomatic Conference of the Plenipotentiaries on the Establishment of the International Criminal Court, "Report of the Preparatory Committee on the Establishment of an International Criminal Court" (1998) *UN Document A/CONF.183/13 Vol 3,* 31 – see footnote 71 "(…) Others have an open mind. Some delegations

with strong resistance because most of the delegations had a perception that "the underlying idea of the Court was nothing else but individual responsibility for criminal acts."[374] It is argued in sustenance of the notion of corporate liability that ideally the object is to place corporate criminal liability on the same footing with individual criminal liability, because both natural and juristic persons are capable of committing crimes. Therefore, these two principles should not be perceived as mutually exclusive in processes of social control.

3 5 5 2 Complementarity principle as underlying factor

Complementarity can be inferred or be located in various provisions of the Rome Statute. This includes, the Preamble, article 1, article 17 and article 19 of the Rome Statute. The effect thereof is to vest states with the right of primacy over international crimes. The assumption is that the ICC may only assume jurisdiction over a matter where a state that have jurisdiction over crimes committed is "unwilling or unable to genuinely investigate or prosecute".[375] This principle was used as militating factor that led to the refusal of the corporate scheme.[376]

The perception was that to embrace corporate scheme would inappropriately disrupt the primacy right of the states that exclude criminal corporate scheme.[377] Some commentators

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hold the view that providing for only the civil or administrative responsibility of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed."

[374] United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of the International Criminal Court, "Summary of Records of the Meetings of the Committee of the Whole" (1998) *UN Document A/CONF.183/13 Vol 2,* 133 -136.

[375] Art 17(1)(a) of the Rome Statute of the ICC.

[376] Haigh (2008) *Australian Journal of Human Rights* 204; J Kyriakakis "Corporations and the International Criminal Court: The Complementarity objection stripped bare" (2008) *19 Criminal Law Forum*, 115 -151 at 116; Eser "Individual Criminal Responsibility" in *Rome Statute of the International Criminal Court* 779; UN Diplomatic Conference of the Plenipotentiaries on the Establishment of the International Criminal Court, "Summary of Records of the Meetings of the Committee of the Whole" (1998) *UN Document A/CONF.183/13 Vol 2,* 133 – see concern from Mr Krokhmal of Ukraine "(…) the implementation of the Court's decision in countries in which the responsibility of criminal organizations was not covered by domestic law, and also about the implications for the fundamental principle of complementarity on which the draft Statute was built. If paragraph 5 and 6 were maintained, in whatever form, did that mean that the procedures of countries which could not comply with paragraph 5 and 6 because of their domestic law did not provide for the criminal responsibility of organization would be considered ineffective or non-existent within the meaning of the complementarity principle?"

[377] Kyriakakis (2008) *Criminal Law Forum* 116.

on the subject argue that the inclusion of corporate criminal liability would render the implementation of complementary principle unworkable.[378] Further, that it undermines the basic principle of primacy; it is practically difficult and it presents insurmountable challenges.[379] Corporate criminal scheme lacks universal recognition, moreover, and as it was observed in chapter 2 above, even in states where it is recognized there exists no common approach.[380] Consequently, it has the potential to negatively affect states' "[o]bligation to implement the Rome Statute and it may create international disparity which could not be brought in concord with the principle of complementarity."[381]

In contrast, these arguments lose much of their force when considered in light of the argument advanced by Kyriakakis, that is, with or without including corporate criminal liability, the complementarity principle will still operate effectively. This is because "whenever no action has been taken in relation to a case by a state that has jurisdiction over it, the case will automatically be admissible under the ICC provided it is of sufficient gravity".[382]Further that even where inaction on part of the state wrought by lack of national law, the matter may still be admissible before the ICC. It then follows that the exclusion of corporate scheme from the purview of the ICC, is a matter of preference rather than the protection of the complementarity principle *per se*. In support of this argument, Kyriakakis noted that the age required for criminal liability and the disdain of immunity provided under the Rome Statute are not consistent with national practices – but the delegations adopted them into the Rome Statute without raising objections on the intricacies thereof.[383] An analysis of the age of criminal responsibility (eighteen for the ICC) reveals conflicting standards that are provided

[378] K Ambos "General Principles of Criminal Law in the Rome Statute," (1999) *10 Criminal Law Forum,* 1 at 7.
[379] W A Schabas "General Principles of Criminal Law in the International Criminal Court Statute," (1998*) 6(4) Eur. J. Crime, Crim. L & Crim. Just.* 84 94.
[380] M Frulli "Jurisdiction Ratione Personae" in A Cassese, P Gaeta & J R W D Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary Volume 1* (2002) New York: Oxford University Press, 527 – 542 at 532 - 533.
[381] Eser "Individual Criminal Responsibility" in *Rome Statute of the International Criminal Court* 779.
[382] Kyriakakis "Corporations and the International Criminal Court: The Complementarity objection stripped bare" (2008) *19 Criminal Law Forum* 115 125.
[383] Kyriakakis (2008) *Criminal Law Forum* 124.

in domestic and international criminal penal codes. For example, just to reflect on a select few states: South Africa sets the age of liability at 10 years and older;[384] Namibia sets it at 07 years and older; England and Wales sets it at 10 years whereas Scotland sets at 08 years.[385] For Germany the age of capacity is 14 years[386] and for Belgium the effective age for criminal liability is 18 years.[387]

Despite these remarkable differences in approach regarding the age of criminal liability, the drafters of the Rome Statute went on and adopted the provision that prescribe the minimum age of criminal accountability at 18 years old and above.[388] Thus, if vast national differences regarding the age of criminal accountability proved not to be fatal for the notion of differentiating views of individual criminal liability – why should diverging national views on corporate scheme be treated as an insurmountable obstacle that stands in the door for averting its inclusion. The beauty of complementarity is supposed to be the elegant compromise: to make room for different national legal cultures and practices while working towards the same goal: bringing an end to impunity for atrocity crimes.

3 5 5 3 Observation on time constraints

Time proved to be a scarce resource during the Rome Conference, in particular, the time that was devoted to the discussions on corporate scheme. This was one of the concerns that were raised by the delegations. Due to the time that was limited, delegations could not exhaust or fully explore the intricacies associated with the principle of corporate criminal liability and its inclusion in the Rome Statute. Even though the French proposal was

[384] Section 7(1) of the South African Child Justice Act 75 of 2008.
[385] C Dwyer & S McAlister "Raising the age of criminal responsibility: endless debate, limited progress" (2017) 3 *ARK Feature* 1-3.
[386] M Bohlander *Principles of German Criminal Law* (2009) 22.
[387] C van den Wyngaert & S Vandromme *Strafrecht en Strafprocesrecht in Hoofdlijnen* 9 ed (2014) 293.
[388] Art 26 of the Rome Statute of the ICC; M Happold "The age of criminal responsibility in International Law" in K Arts & V Popovski (eds) *International Criminal Accountability and the Rights of Children* (2006) 69 74.

subjected to rigorous review, much time was still required in order to iron out the ambiguities and textual challenges that it presented.

In this regard Mr Penko of Slovenia alluded that "in view of the time constraints, the only rational solution would be to delete any reference to the criminal responsibility of legal persons and leave the question to future legislators to decide".[389] Therefore, it follows that if there was sufficient time, possibly the Rome Conference would had exhausted the debate on inclusion or otherwise of the principle of corporate criminal liability in the text of the Rome Statute. Unfortunately, the limited time was undeniably one of the factors that contributed to the retraction of the French proposal.

3 5 6 The absence of Corporate criminal liability in the Rome Statute of the ICC

Regarding the ICC's aspiration, namely: "to put an end to impunity for those who commit international crimes",[390] in its current form, the ICC is only competent to adjudicate on international crimes[391] that are committed by natural persons to the exclusion of the same international crimes when committed by juridical persons.[392] In this regard it clearly provides that "the Court shall have jurisdiction over natural persons pursuant to this Statute."[393] The Rome Statute of the ICC expressly makes provision in terms of article 25(2) that an offender who commits international crimes should be individually accountable.

Ambos observed that "there can be no doubt that by limiting criminal responsibility to individual natural persons, the Rome Statute implicitly negates – at least for its own jurisdiction – the punishability of corporations."[394]In *Prosecutor v Germain Katanga*[395]

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[389] United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of the International Criminal Court, "Summary of Records of the Meetings of the Committee of the Whole" (1998) *UN Document A/CONF.183/13 Vol 2,* 136.

[390] Para 5 of the Preamble of the Rome Statute.

[391] Art 5 of the Rome Statute.

[392] Eser "Individual Criminal Responsibility" in *Rome Statute of the International Criminal Court* 778.

[393] Art 25(1) of the Rome Statute.

[394] Eser "Individual Criminal Responsibility" in *Rome Statute of the International Criminal Court* 778.

[395] Case No. ICC-01/04-01/07, decision of Trial Chamber II, dated 7 March 2014.

("Katanga") the ICC interpreted article 25 of the Rome Statute of the ICC, in which the Chamber stated that article 25 recognizes individual criminal accountability as the mainstay of international criminal law. – that is, only natural persons can be found accountable for international crimes.[396] This may be construed to entail without doubt that the ICC adheres to the principle of individual criminal responsibility and excludes any form of corporate scheme. Further, in *Prosecutor v Jean-Pierre Bemba Gombo*[397] ("*Bemba*") the court convicted the accused based on the conduct of the *contras* who committed atrocities while under his leadership. In this case the court emphasised that criminal liability was individual. Bemba's conviction was later set aside by the Appeals Chamber[398], but that was because the Appeals Chamber found that one of the elements of command responsibility under Article 28(a) of the Rome Statute was not properly established. The effect of the Appeal Chamber's decision is to confirm, rather than deny, the centrality of individual criminal liability as the mainstay of ICC jurisdiction over persons.

Secondly, the Rome Statute of the ICC does not even contemplate to entertain issues pertaining to the declaration of offending corporations as criminal (analogous to what was possible at the IMT Nuremberg). This entails that even when seized with incontrovertible evidence proving corporate involvement in committing atrocity crimes, such an offending corporation cannot be declared as a criminal corporation by the ICC.

The Rome Statute of the ICC makes provision for a hierarchy of laws which may be resorted to by the ICC. These laws may be construed as the sources of laws applicable under the ICC and includes, in their order of priority, in the *first* category, it is the Statute itself, the Elements of Crimes and its Rules of Procedure and Evidence[399]; the *second*

[396] Para 1386.

[397] Case No. ICC-01/05-01/08, Para 59, decision of Trial Chamber II dated 21 March 2016.

[398] *Prosecutor v Jean-Pierre Bemba Gombo*, 'Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"', Case No ICC-01/05-01/08 A (8 June 2018).

[399] Art 21(1)(a) of the Rome Statute of the ICC.

category of laws include "treaties, principles and rules of international law";[400] and the *third* category includes principles obtained from domestic courts and national laws. The *Fourth* category refers to principles derived from previous interpreted decisions.[401] Taken together, all of this means that there is simply no textual or interpretative or jurisprudential avenue for the ICC to apply the doctrine of corporate criminal liability.

3 5 7 National Courts may prosecute juridical persons for core crimes

Despite the exclusion of corporate scheme from the jurisdiction of the ICC as implicitly provided for in terms of article 25 of the Rome Statute[402] some scholars argue that the Rome Statute does not entirely exclude holding corporations liable for atrocity crimes. The vehicle is not the ICC, of course, but rather the logic of complementarity. That means that companies could still be indicted for atrocity crimes in national courts. There is nothing in the Rome Statute, or, indeed international law that would prohibit this.[403]

The Rome Statute is relatively flexible regarding domestic implementation and the emphasis is on minimum expectations regarding cooperation between state parties and the ICC, not so much in terms of domestic laws' treatment of the general or specific part of international criminal law.[404] But this is not an entirely satisfactory conclusion. This dissertation argues that the exclusion of corporate scheme from the jurisdiction of the ICC is basically wrong. The solution is not to rely solely on national legal systems to deal with corporations who are responsible for atrocities as these systems see fit. I have noted the diverse and even contradictory approaches to corporate liability in various national legal systems. The result is that corporations – who are often enormous transnational actors –

[400] Art 21(1)(b).
[401] Art 21(2).
[402] Art 25(1) and (2) of Rome Statute of the ICC state "the Court shall have jurisdiction over natural persons pursuant to this Statute. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute."
[403] Kelly (2012) *Harvard Law & Policy Review* 365.
[404] Art 1 of the Rome Statute of the ICC.

can still escape responsibility entirely because of the limitations of domestic legal systems. For this reason, the ICC was precisely created to plug the impunity gap regarding international atrocity crimes. This is the reason why immunities are (still) inapplicable at the ICC,[405] even though they are applied and respected at the domestic level because of the applicable international and national (constitutional) law. By the same token, if the ICC and its legislative community, via the Assembly of States Parties (ASP) are serious about the quest to end impunity for atrocity crimes, they must also be serious about the provision of corporate scheme for ICC jurisdictional purposes – particularly, corporate criminal responsibility.

The Rome Diplomatic Conference, as was noted above, could not find agreement on the question of corporate criminal liability for atrocity crimes. One of the excuses for the lack of agreement was that the conference ran out of time. This was, at best, a lame excuse, but at least the Rome Statute itself provides for the possibilities to amend (article 121) and review (article 123) the Statute. These two options will be explored in the next section. The first opportunity to review the Rome Statute was in 2010, at the First Review Conference in Kampala. Yet again the issue of corporate criminal lability was left by the wayside, no doubt also because of the dominance of the (at that time) unresolved issues related to the definition of the crime of aggression, which sucked up almost all the time and resources of the review process. Nevertheless, it needs to be asked whether the Rome Diplomatic Conference of 1998 was really the last word on the inclusion/exclusion of corporate criminal liability or is there still a possibility to include corporate criminal liability via either the amendment or the review route.

[405] O Triffterer & C Burchard “Article 27 Irrelevance of official capacity” in O Triffterer and K Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (2016) at 1048.

3 5 8 Did the buck stop at the 1998 Rome Conference?: Possibilities presented by the amendment and review procedures provided for in the Rome Statute

In the preceding discussions, it was made clear that the principle of corporate criminal responsibility was on the agenda of the Rome Conference in 1998 when the international community was drafting the Rome Statute of the ICC. Because of several challenges identified above, the principle of corporate liability was not included in the text of the Rome Statute of the ICC. As noted, the first Review Conference of the Rome Statute, which was hoisted in Kampala, presented an opportunity to further deal with the matter of corporate criminal liability, for which there apparently was not enough time at Rome in 1998.

There are *two* avenues for an eventual amendment of the Rome Statute. Article 121 (3) which provides that an amendment of the Rome Statute can be adopted at a summit of the ASP presents the first possibility, and the second possibility for the adoption of an amendment is through a review procedure (as provided for in Article 123). The ASP meets annually, but before a proposed amendment can be put on the agenda, the relevant state party needs to submit the text of the proposed amendment to the UN's Secretary-General, for purposes of causing the proposal to be circulated all member states. Then, "no sooner than three months from the date of notification, the ASP at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal."[406]

When the ASP is seized with the proposal, depending on the complexity thereof, it may opt to deliberate and form its position on the proposal. Alternatively, the ASP refer the proposal to the Review Conference. The adoption of an amendment at a meeting of the ASP "requires a two-third majority."[407] Similarly, the adoption of an item deliberated through a review procedure where consensus is not reached may "[r]equire a two-third majority to sanction such adoption."[408] Unlike ASP meetings, which are held annually, Review

[406] See, art 123 of Rome Statute of the ICC.
[407] Art 121(1).
[408] Art 123(1) to (3).

Conferences are held less frequently. The First Review Conference was held pursuant to Article 123 (1) of the Rome Statute, which makes provision for a period of seven years "[a]fter the entry into force of the Rome Statute, the Secretary-General of the United Nations must convene a Review Conference to consider any amendments to the Rome Statute."[409]

The First Review Conference was duly convened in 2009, and the Conference took place in 2010 in Kampala, Uganda. Article 123 (2) of the Rome Statute provides for any subsequent Review Conferences. A state party may request a Review Conference for the purpose of any amendments to the Rome Statute. This could include the crimes listed in the Rome Statute.[410] A state party have an option to request a Review Conference to be convened – which request is subject to the approval of the other member states. This approval requires a two-third majority.

The period immediately after the Rome Statute came operational and before the First Review Conference in 2010, witnessed much legal discourse. It was anticipated that the First Review Conference would possibly prioritise and shed light on the principle of corporate criminal liability.[411] However, the First Review Conference focused primarily on the crime of aggression, the complementarity principle, and the amendments of article 8 concerning war crimes ("prohibition of certain weapons in non-international armed conflicts").[412] The principle of corporate criminal liability was ultimately not included on the agenda as a matter for discussion. This is a striking concern because the expectation was that since the Rome Conference failed to exhaust corporate criminal responsibility issues such issues ought to have been deferred to and considered by the Kampala Review Conference.

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[409] Art 123(1).
[410] Art 5 of Rome Statute.
[411] N Gotzmann "Legal personality of the corporation and International Criminal Law: Globalisation, Corporate Human Rights Abuses and the Rome Statute" (2008) 1(1) Queensland Law Student Review 36 52; Kyriakakis (2008) *Criminal Law Forum*151; Haigh (2008) *Australian Journal of Human Rights* 204.
[412] M Wierda "The Rome Statute Review Conference: Thematic Case Study" (2010) *International Centre for Transitional Justice* 1- 8 available at <http://www.ictj.org> (accessed on 2016/05/09).

The Kampala Review Conference was unsuccessful in addressing (did not address) the principle of corporate criminal liability and as such corporations continue to be excluded from the text of the Rome Statute and subsequently from the jurisdiction of the ICC. Despite the setback evidenced by the Rome Conference and the Review Conference in Kampala, it is argued that the debate on whether to prosecute legal persons for atrocity crimes is far from over for as long as corporations are suspected to be involved in the commission of such atrocities.[413] To support this argument, a detailed discussion on corporations and human rights violations is provided in chapter 4 below.

3 6 Development of corporate criminal liability at International level

The section above discussed the principle of corporate criminal liability in the context of the ICC, the institutional manifestation of international criminal law's moral imperative – "the fight against impunity for the most serious crimes under international law."[414] It was demonstrated that the Rome Statute expressly adopted the principle of individual criminal responsibility and implicitly excluded corporate criminal liability. This section strives to identify *other* international instruments (beyond the Rome Statute) that may be construed to incorporate corporate criminal responsibility, if not explicitly, then at least as a theoretical possibility. This is done to illustrate that (a) corporate criminal liability should be seen as a moral imperative informing the international criminal justice project, and (b) international criminal law is more than its most prominent institutional and legal exponent, the ICC. Conclusions will be drawn in terms of these instruments' utility as norm creators, norm confirmers, norm prompters or neutral/permissive norm enablers.

There are several international instruments that may be construed to contain provisions that contemplate to proscribe illegal corporate conduct by means of requiring states to criminalise certain corporate conduct. These international instruments mandate the state

[413]Kyriakakis (2008) *Criminal Law Forum* 150.
[414] Which the bedrock of this dissertation.

parties to provide for corporate criminal liability[415] or other appropriate corporate liability models at national level.[416] Some of these international instruments obligate state parties to not only hold the corporations criminally liable but that they stretch further and request the state parties to declare offending corporations as criminal entities.

These international instruments include: First, the *International Convention on the Suppression and Punishment of the Crime of Apartheid* (ICSPCA) of 1974.[417] The object of this instrument was to "put an end to impunity" for those who were accountable for the crime of apartheid – namely: *juristic*, and *natural persons*. The ICSPCA instrument is relevant to the current discussion on corporate criminal responsibility, because it reflects the approach that was adopted by the UN when the crime of apartheid was rife in Southern African states. The crime of apartheid falls under the class of crime against humanity as such also incorporated in the Rome Statute.[418] The UN desired to put an end to impunity by adopting a convention that contemplated to hold responsible both individuals and organisations who were authors of the crime of apartheid. This is apparent form the language of the ICSPCA when it provides that state parties must put in place legislation that proscribe the crime of apartheid committed by individuals. Further that "[s]tate parties to the convention may declare criminal those organisations, and institutions committing the crime of apartheid".[419] The puzzling question as to why the Rome Statute, which was authored by the same

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[415] See, Organisation for Economic Cooperation and Development (OECD) Convention on Combating of Bribery of Foreign Public Officials in International Business Transaction 1997 entered into force on 15 February 1999, art 3(1) provides that "the bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties (…)."

[416] Art 3(2) of the OECD Convention on Combating of Bribery of Foreign Public Officials in International Business Transaction provides that "[I]n event that criminal responsibility is not applicable to a legal person that state party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions for bribery of foreign public officials."; Art 9(1) of the Council of Europe Convention on the Protection of the Environment Through Criminal Law of 1998; Art 5 of the International Convention for the Suppression of the Financing of Terrorism of 1999, entered into force 10 April 2002; Art 26 of the United Nations Convention against Corruption, entered into force 14 December 2005; Art 10 of the United Nations Convention against Transnational Organised Crimes, entered into force 29 September 2003.

[417] General Assembly Resolution 3068 (XXVIII), 28 UN GOAR Supp. (No.30) at 75 U.N. Document A/9030 of 1974, 1015 U.N.T.S 243 entered into force on 18 July 1976.

[418] Rome Statute of the ICC, art 7(1)(j).

[419] Art 1(2) of ICSPCA.

international community, who were the authors of the ICSPCA, opted to exclude corporate liability, was partly addressed in the sections above and partly in chapter 7 below. The point of interest here is to demonstrate that the *context* of adopting international instruments may be different – however, the *object* which is the overriding factor (to end impunity) may still have resonance in the quest to expand the reach of the ICC to include jurisdiction over organisations and corporations responsible for atrocity crimes.

In as much as the context under which the ICSPCA instrument was adopted is different from the context in which the Rome Statute was adopted – the object in both these instruments is similar, that is "*putting an end to impunity*" for those responsible for the gross violation of human rights – apartheid. The difference is, as noted in this chapter, that the Rome Statute limits the ICC's jurisdiction to punishment of natural persons.

The observation here is that under the ICSPCA, the UN demonstrated a willingness to prompt states to put in place legislation that contemplated the criminal liability of entities other than natural persons – organisations, by name, and possibly corporations, by implication.

Second, is the *United Nations Convention against Transnational Organized Crime* (UNCTOC)[420]and the Protocols thereto. The aim of the UNCTOC (as is provided for in its object clause) is to wage a fight against transnational organised crime at global level. Lewis argues that the most significant catalysts for transnational organised crimes are opportunities presented by globalisation and that the actors, who are responsible for these transnational crimes include corporations.[421]

[420] UN Convention against Transnational Organized Crime, United Nations General Assembly Resolution 55/25 of 15 November 2000.

[421] MK Lewis "China's Implementation of the United Nations Convention against Transnational Organised Crimes" (2007) 2(2) *Asian Journal of Criminology*, 179 180.

The UNTOC has been implemented in several countries and this signifies a global acceptance or recognition thereof.[422] The operational provisions of the UNTOC require state parties to criminalise, subject to domestic laws, conduct of legal persons that may be construed as criminal. This in itself demonstrates that the conduct of corporations, from the standpoint of the international community, is not purely economic or morally neutral.[423] Further, the international community recognizes, as is indicated by signatories to the UNCTOC, the *principle* of corporate criminal accountability. It should also be stated that, as is the case with many aspirational international instruments, the text of the UNCTOC does not go so far as to impose a particular form of corporate criminal liability on states parties. Rather, parties to the UNCTOC are persuaded to make provision for the liability of corporate entities. The provision regarding corporate liability is not mandatory, instead, it depends to the extent that it is compatible with domestic legal doctrine.

The UNCTOC therefore foresees a spectrum of possible modalities in terms of corporate liability, including "pure" criminal liability, administrative liability and even civil liability.[424] Thus, a country like Germany, for instance, is not obliged to abandon its national criminal law principles on criminal liability and is allowed to construct anti-trafficking laws that fit its approach to corporate liability. The minimum standard required by UNCTOC is that states must ensure that corporations which are responsible for human trafficking "are subject to effective, proportionate and dissuasive sanctions, whether they are criminal or not."[425] While the pragmatism and flexibility in the UNCTOC is understandable from a political point of view (one can understand the need not to upset national systems that do not yet recognize full

[422] A Standing "Transnational organized crime and the Palermo Convention: A reality check" (2010) available at <www.ipinst.org> (accessed on 2018/04/23).

[423] P Williams & R Godson "Anticipating organized and transnational crime" (2002) 4 *Crime Law and Social Change* 311 355.

[424] UN, Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime (2004), available at <https://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf>.

[425] S Rodriguez-López "Criminal liability of legal persons for human trafficking offences in international and European law" (2017) *Journal of Trafficking and Human Exploitation* 95 102.

corporate criminal liability). In this vein, it stand to be pointed out that the UN itself, in its Legislative Guides for the implementation of the UNCTOC, believes that corporate criminal liability in the proper sense of the term is regarded as the best modality.[426] This is because of the deterrent effect of the criminal sanction, which carries stigmatisation, and can "encourage companies to adopt more effective management and supervisory structures."[427]

In terms of substantive law, the UNCTOC proscribe the commission of serious crimes that occasion transnationally, which crimes are committed by organised criminal groups[428] and from which, such organised criminal group may derive benefits. The principal provision that enumerates liability of corporations is article 10 of the UNCTOC which places an responsibility on state parties to employ in their domestic legal systems the necessary measures to "ensure that legal persons are held civilly, criminally or administratively liable"[429] for their complicity in the commission of crimes.[430] Important to this discussion is the issue of implementation of the UNCTOC. This is because the implantation of UNTOC at domestic level, without doubt, signifies the predisposition of the international community in developing the principle of corporate responsibility.

Indeed, some forms of organised criminality, for instance the crime of human trafficking, are dependent on corporate structures and the transnational connections that modern corporations facilitate. With reference to human trafficking, the drafters were of the view that the "trafficking industry is consistently growing due to its prevalence in the corporate

[426] UN, Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime (2004) at para 240.
[427] Rodriguez-López (2017) *JTHE* 102.
[428] Art 2(a) UNCTOC, defines an Organized Criminal Group to "mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit."
[429] Art 5 UNCTOC.
[430] Art 11(3) United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, United Nations General Assembly Resolution 55/25 of 15 November 2000, the Protocol was open for signature on 12 -15 December 2000 in Palemo, Italy, and thereafter at the United Nations Headquarters in New York until 12 December 2002 and came into force on 25 December 2003.

world".[431] The corporate *actus reus* in the context of a transnational crime like human trafficking is by no means restricted to the direct recruitment and exploitation of modern day human slaves, but include secondary forms of trafficking as well, for instance where corporations knowingly or carelessly hire trafficked workers supplied by third parties.[432] While the UNTOC does not create mandatory corporate criminal liability at the domestic level, there are strong pointers in this instrument and in the Protocols and legislative guides thereto that the international community's preferred modality to sanction corporations for their conduct in the context of transnational crime, is *criminal liability*.

Third, is the *Organization for Economic Co-operations and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*[433], (OECD Anti-bribery convention) which recognizes and provides for criminal accountability for corporations. This instrument recognizes that corporations are global actors and that their conduct may potentially violate human rights. The violation of human rights may be construed as criminal, if the violation is serious and/or systematic. On this score, the instrument seeks to regulate corporate conduct by requiring "state parties to establish liability of legal persons."[434] The effort includes criminalising the offence of bribery in international business. It follows that punishment may include criminal and civil sanctions.[435] As with the UNTOC, it is apparent that the model of corporate criminal liability is preferred, although not mandatory. The emphasis is on liability in some form, coupled with an effective sanctioning regime.

It is therefore submitted that derived from the discussion on some of the identified international instruments above, there are inroads that has been made at international level

[431] TM Parente "Human trafficking: identifying forced labour in multinational corporations and the implications of liability" (2014) *Brazilian Journal of International Law* 148.
[432] Rodriguez-López (2017) *JTHE* 98.
[433] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
[434] Art 2.
[435] Art 3.

with object to put an end to impunity by holding corporations responsible for the commission of crimes, including crimes that may be construed as transnational or international crimes.

An observation on the international instruments discussed above is that these instruments do not contemplate to create an international forum for the prosecution of corporations. Rather, they delegate such functions to domestic institutions. The failure to create an international forum has the potential to lead to divergent views on the question of whether these international instruments were intended to develop the corporate liability scheme at international level *proper*.

Some scholars are of the opinion that to address this question requires appreciation of international conventions. For example: the accepted norm that international conventions are sources of international law. On this score, it is general knowledge that international conventions "are the primary sources of international law."[436] If an instrument qualifies as an international convention then what follows is to determine whether such international convention falls under the category of law making conventions or not.[437] To identify if an international convention is a law making convention the following characteristics must be established: first, the convention must embody "abstract legal rules which the parties explicitly agree to recognise as common norms for their future conduct." Second, it must be open and available to the ascent of all interested state parties.[438]

Other scholars extend their arguments beyond the normative classification of law making or non-law making conventions. These scholars hold the view that all international conventions that contemplate to provide rules which state parties observe (implement) as law, are law making conventions *per se*.[439] A convention may function as an indicator of the

[436] Dugard *International Law* 25.
[437] A Holcombe "Improvement of international law making process" (1961) 37(1) *Notre Dame Law Review* 16 16.
[438] B Kishoiyain "The Utility of Bilateral investment treaties in the formulation of customary international law" (1994) 14(2) *Northwest Journal of International Law and Business* 327 334.
[439] Kishoiyain (1994) *NJILB* 335.

state parties' consent. Thus, the higher the number of signatories to a universal convention the lesser the uncertainty to whether the principles contained in the convention are practiced at domestic level. This proposition follows that if a state party ascent to an international convention, the ascent may be construed as proof that the principle in question existed at domestic level prior to the conclusion of a convention. In this manner, a convention may be a useful tool that indicates the existence of a rule of international customary law or the creation of new rules of international law.[440]

To place the above discussion on the nature of international convention in its proper context, it is important to recognise, firstly that the international conventions discussed under this section were open for ascent by all state parties of the UN. Secondly, they contain abstract principles which state parties commonly accept to observe and implement,[441] including the obligation on state parties to put in place legislation that seeks to hold corporation responsible. In this manner, these conventions may fit within the ambit of the law making category of international conventions. Culminating from the discussion above, one may argue that despite the different contexts that led to the formulation and adoption of these conventions, they may be instructive in the quest for the advancement and recognition corporate scheme at international level. This is so, especially when understood from a distinct international criminal law perspective where the focus is an end to impunity for all actors/ participant (natural and corporate) in atrocity crimes.

3 7 Corporate criminal liability in regional perspective

In this Chapter, the analyses centre on the development of the principle of corporate criminal responsibility from an international law perspective. The focus now shifts to developments at the regional level – notably the African and European regions. Both regions

[440] E Nys "The development and formation of international law" (1912) 6(1) *The American Journal of International Law* 1 21.
[441] H Kelsen *General theory of law and state* (1946) 328.

are characterised by institutional arrangements for political and economic integration and integrative state cooperation, which include supranational structures for legal and normative integration.

3 7 1 The development of corporate criminal liability at African Union level

The criminal liability of body corporates under the instruments of the African Union is not foreign. There are instruments that provide for measures against corporate offences.[442] However, the challenges which they present are similar to the challenges identified in the previous section*, inter alia*, whether the regional instruments in question were intended to develop the principle of corporate criminal responsibility. In addition, it is also questionable whether the regional instruments provide for effective enforcement mechanisms.

Regional instruments regulate the conduct of states within a specified region. In contrast, and as it was demonstrated in sections above, international instruments are intended for universal application. One may therefore ask what the relevance of some of these regional instruments is. Does an understanding of regional instruments that makes provision for corporate criminal liability contribute in a meaningful way to the main thesis of this study, namely that there should be effective international and institutional provision for corporate criminal liability for atrocity crimes? The short answer is yes, it is relevant and potentially useful to look at the way in which regional instruments deal with corporate criminal liability. Regional instruments help us to understand tendencies and normative developments beyond individual states. In a sense, regional developments could also be viewed as microcosms of larger international trends.

Indeed, if one looks at the African region with its 55 states[443] it is not a negligible cohort when compared to the total number of states in the world, not to mention the one billion

[442] OAU Convention on the Prevention and Combating of Terrorism adopted on 14 July 1999; African Union Convention on Protecting and Combating Corruption, adopted on 1 July 2003 (entry into force 5 August 2006).
[443] The AU recognizes 55 states as members. See, <https://au.int/memberstates> (accessed on 2019/07/28).

inhabitants of the African continent. The African region also represents a mix of legal systems, including the Anglosphere's common law and the Francophonie's civil law traditions. If a region as diverse and complex as Africa can reach consensus on regional instruments to deal with social and criminal phenomena in a certain way, it is submitted that that in itself can help us to understand the usefulness of that approach in a broader, universal context. First, it is necessary to identify relevant instruments for purposes of this analysis. The *Bamako Convention*[444] and the *African Union Convention on Preventing and Combating Corruption*[445] are two relevant instruments to start this analysis with. The former convention provides for the ban on cross border carriage and storage of perilous waste. This convention is important to the discussion on corporate criminal responsibility because, among others, it recognizes that corporate conduct may violate protected social interests and human wellbeing. Further, the context in terms of which it was adopted underscores the AU's reaction and condemnation levelled against corporate unlawful conduct.

The issues of corporations and human rights violations internationally and comparatively are discussed at great length in chapter 4 below. However, for purposes of placing the African conventions in their proper context it is necessary to provide the background and events that preceded their adoption. The Bamako Convention was preceded by outrageous acts committed by transnational corporations such as Ecomar and Jelly Wax. These corporations were registered in Italy and they knowingly exported toxic waste into Nigeria. This exportation violated the rights of people who resided in the vicinity of Koko port in Nigeria where the toxic waste were stored. With these corporate unlawful conduct in mind, the AU through the text of the Bamako Convention, placed an obligation on state parties and generators of the hazardous waste.

[444] Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa of 1991 adopted on 30 January 1991 and opened for signature 30 January 1991 to 31 July 1991 (entered into force 22 April 1998).

[445] Union Convention on Protecting and Combating Corruption, adopted on 1 July 2003 (entry into force 5 August 2006).

The obligation is to ensure that the transportation and disposal of hazardous waste is done in a way that does not infringe the rights of the people and their environments.[446] In essence, to import hazardous waste into Africa is prohibited and such importation "is deemed to be illegal and a criminal act".[447] The concept of 'generator' means any person,[448] whereas the concept of 'person' is defined to include any natural or legal person.[449] Thus, it is clear from these definitions that the proscribed conduct is not only limited to wrongful conduct committed by natural persons but rather includes that of the legal persons or corporations. State parties are obliged to "[i]ntroduce national legislation for imposing criminal penalties and these contemplated criminal penalties are required to effectively punish and deter"[450] any illegal importation of hazardous waste.

A purposive reading of the Bamako Convention suggests that the drafters intended corporate criminal liability to be part of the strategies to fight the dumping of hazardous waste in Africa. This reading of the Bamako Convention is echoed in Africa's first regional criminal justice instrument, the Malabo Protocol, which is discussed further below. Suffice to point out that the Malabo Protocol provides for both the criminalisation of trafficking in hazardous wastes (Article 28L) and corporate criminal liability as a mode of responsibility (Article 46C). Indeed, there is an explicit reference to the Bamako Convention in Article 28L of the Malabo Protocol.[451]

The other relevant instrument that serves as an example of a growing regional recognition of corporate criminal liability is the *African Union Convention on Preventing and Combating Corruption* (AU Anti-corruption Convention).[452] This instrument was preceded by

[446] Para 4 of the Preamble of the Bamako Convention. In terms of the Bamako Convention art 4(3) furthermore (a) requires state parties to undertake to enforce the obligations of the convention against offenders according to relevant laws including international law.
[447] Art 4 (1).
[448] Art 1 (20).
[449] Art 1 (16).
[450] Art 9 (2) of the Bamako Convention.
[451] Art 28L (1) Malabo Protocol.
[452] Union Convention on Protecting and Combating Corruption, adopted on 1 July 2003 (entry into force 5 August 2006).

several corporate scandals. This Convention proscribes corrupt practices committed by both the "public and private sector."[453] It obligates state parties to put in place measures aimed at "preventing companies from paying bribes."[454] It is necessary to state that the Convention recognizes the power and influence of transnational corporations over poor and under-developed countries.[455] This power and influence has the potential cause human rights abuses. In this manner, the Convention seeks to encourage state parties to put in place preventative measures, among others, the promulgation of national legislation that deals with corporate corruption as well as prosecution of offending corporations.[456]

The *AU Anti-corruption Convention* also provides for an enforcement regime which is based on the incorporation of regional frameworks for criminalisation and cooperation at the domestic level.[457] Some scholars argue that the inclusion of substantive and procedural criminal law principles in the AU Anti-corruption Convention may signify that this instrument contemplates to advance the principle of corporate criminal responsibility at regional level.[458] This may be a moot point in light of the Malabo Protocol, which explicitly provides for the criminalisation of transnational economic crimes, *inter alia*: corruption[459] and laundering of money.[460] And, as was pointed out above, these criminalization provisions in the Malabo Protocol are structurally linked to the modes of responsibility, which include corporate criminal liability.

There is a substantive difference between the crime of corruption under the Malabo Protocol and corruption as defined in the AU Anti-corruption Convention. The crime of corruption under the Malabo Protocol refers to forms of corruption that are "of a serious

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[453] This is a unique approach – because usually, anti-corruption laws target the public sector to the exclusion of private sectors.
[454] Art 11(3).
[455] T R Sinder & W Kidane "Combating corruption through international law in Africa: A comparative analysis" (2007) 40(3) *Cornell International Law Journal,* 691 711.
[456] Art 13 (2) of the AU Anti-corruption Convention.
[457] Sinder & Kidane (2007) *Cornell International Law Journal* 714.
[458] Sinder & Kidane (2007) *Cornell International Law Journal* 747.
[459] Art 28I of Malabo Protocol.
[460] Art 28I *bis.*

nature affecting the stability of a state, region, or the [African] Union."[461] Ordinary forms of bribery and 'petty corruption' (for instance where a company would bribe a local government official to obtain a favourable contract) would thus be excluded from the jurisdiction of the envisaged African Criminal Chamber, since these forms of corruption presumably do not affect the stability of the state, region or the AU. On the other hand, this provision in the Malabo Protocol is clearly designed to criminalise systemic forms of corruption ('grand corruption'), and in this regard one could imagine corrupt corporate behaviour on a large enough scale to fall within the purview of the Malabo Protocol.

With reference to the examples of regional instruments discussed above, it is clear that these and other regional instruments in Africa were adopted to address a variety of protected regional human, economic, political, environmental and security interests. However, none of these instruments provided for a comprehensive enforcement regime that included criminalisation, a regional criminal court, and state cooperation. With this major *lacuna*e in mind, and possibly also because of the AU's disenchantment with the ICC as an international criminal law enforcement regime, the Malabo Protocol[462] was adopted to provide for an African regional criminal justice instrument. I refer here to the "Malabo Protocol", but technically the instrument of interest is the Annex to the Malabo Protocol that provides for an amendment to the "Statute of the African Court of Justice and Peoples' Rights." In terms of this amendment, the African Court that is established is a merger of the "*African Court of Justice*" and the "*African Court on Human and Peoples' Rights*". This new African Court is anticipated to operate with three section, including the: "international criminal law section."[463] The latter is often in literature and commentaries referred to as the "*African Criminal Chamber*" or "*African Criminal Court*."[464]

[461] Art 28I (1).
[462] Malabo Protocol, AU, 2014, available at <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> (accessed 2019/03/12).
[463] Annex to the Malabo Protocol art 16.
[464] See, for instance the first academic commentary on the Malabo Protocol, G Werle and M Vormbaum (eds) *The African Criminal Court* (2017) 3-9.

The Malabo Protocol not only does it provides for the establishment of an African Criminal Court, but also for the criminalisation of a number of international and transnational crimes, including the core atrocity crimes (genocide,[465] war crimes,[466] crimes against humanity[467]), the crime of aggression[468], and several other transnational crimes of regional interest, such as the above mentioned crimes of trafficking in hazardous wastes and the crime of corruption, as well as others, including crimes like piracy,[469] terrorism,[470] unconstitutional change of government,[471] and mercenarism[472]. Crucially, as mentioned above, the Malabo Protocol makes provivison for corporate criminal liability as a mode of responsibility, which distinguishes this envisaged regional criminal court from the ICC. Article 46C of the Annex to the Malabo Protocol provides as follows:[473]

"1. For the purpose of this Statute the Court shall have jurisdiction over legal persons, with the exception of States.

2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.

3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.

4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.

5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.

[465] Art 28B Malabo Protocol
[466] Art 28D.
[467] Art 28C.
[468] Art 28M.
[469] Art 28F.
[470] Art 28G.
[471] Art 28E Malabo Protocol.
[472] Art 28H.
[473] For a brief comment on Art 46C, see, Werle & Vormbaum *African Criminal Court* 151-153.

6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes."[474]

When viewed holistically, article 46C makes provision for direct corporate criminal liability, in the sense that it does not predicate a guilty finding against a company on the guilt of a natural person. The provision on corporate *mens rea* in Article 46C (2) is an indication that the drafters of the Malabo Protocol had in mind to create genuine and independent corporate criminal liability as a mode of responsibility independent from individual criminal liability. Indeed, it provides that "[c]orporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence".[475] By implication, this provision may be construed to have adopted the corporate culture model of liability, which take into consideration the structure, control, policies, organisational and management aspects of a corporation.

Taking into consideration the general rule at law that a corporation may not be established for illegal purposes or contrary to the law, it seems odd, on the face of it, that a corporation would have as its policy the commission of acts that are criminal in nature. It is, however, more probable that the drafters constructed subparagraph 2 to create corporate *mens rea* for purposes of direct corporate liability by incorporating the relevant company's general objectives and business purpose. Even a company with a perfect legitimate aim and policies can commit crimes. In addition, the drafters of the Malabo Protocol opted not to rely on vicarious liability as a mode of corporate liability (ie the *mens rea* of a natural person is not assigned to the corporation; rather, the corporation's own, independent intention is established with reference to the tool created in Article 46C (2)). Any acts that align with the stated policy of the company will therefore be proof of corporate intent to commit the relevant

[474] Art 46C of Malabo Protocol.
[475] Art 46C(2).

acts. This is not a presumption of guilt (the other elements of criminal liability must be established as well), but rather a tool for the prosecution to prove corporate *mens rea*.

Article 46C assumes that in order for a policy referred to in article 46C (2) to be attributed on a corporation, such a policy must "[p]rovide a reasonable explanation of the conduct of the corporation in question".[476] Furthermore, Article 46C, unlike the identification theory or the vicarious liability principle, does not distinguish between the levels of authority possessed by employees of a corporation. In this regard, it provides that "corporate knowledge of the commission of crime by corporation" may be assessed and ascertained, arguably, even at the lower ranked employees of a corporation.[477] For this reason it is distinguishable from the identification theory which requires that for an employee's conduct to be imputed on the company, such an employee must be identified with the corporation, in particular such employee must be in higher position of authority that is necessary to direct the will and affairs of a corporation.

The inclusion of corporate criminal liability as a mode of responsibility in the Annex to the Malabo Protocol is a progressive and potentially paradigm-shifting development in international criminal law. It creates direct criminal responsibility for corporations who are guilty of committing or contributing to atrocity crimes and serious transnational crimes. This is, in theory at least, a welcome development. The problem is that few African states are signatories to the Malabo Protocol, and there were, "at the time of writing of this dissertation," no ratifications.[478] The operationalisation of the envisaged African Criminal Court is thus still a long way off. But, the establishment of the principle of corporate criminal liability at the regional level is a groundbreaking development regardless.

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[476] Art 46C (3) Malabo Protocol.

[477] Art 46C (4)(5).

[478] At the time of writing (updated 8 July 2019): 15 signatories and 0 ratifications. For the updated AU Malabo Protocol status list, see <https://au.int/sites/default/files/treaties/36398-sl-PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf.> (accessed on 2019/07/28).

3 7 2 The Council of Europe

In the preceding subsection, the analysis focused on the development of corporate criminal responsibility from the AU perspective. It was demonstrated that indeed there are AU instruments that may be construed to advance the principle of corporate criminal liability. Shortfalls were identified and recognized as such. I will now turn to Europe for a comparative regional perspective. The Council of Europe (CoE) was founded in 1949,[479] among its objects is to uphold human rights, enhance cooperation and the rule of law. It consists of two organs namely, the Committee of Ministers and the Parliamentary Assembly.[480] The Parliamentary Assembly performs legislative functions and makes recommendations[481] to the Committee of Ministers for final action on such recommended items.[482] The CoE have concluded several Conventions, and it is apparent that some of the Conventions recognized and incorporated the principle of corporate criminal liability. Among the conventions that recognise and enumerate the principle of corporate criminal liability include, *Council of Europe Criminal Law Convention on Corruption*,[483] *Council of Europe Convention on Action against Trafficking in Human Beings*,[484] *Council of Europe Convention on the Prevention of Terrorism*,[485] and *Council of Europe Convention on the Protection of the Environment through Criminal Law*.[486]

The *Council of Europe Criminal Law Convention on Corruption* (European Treaty 191) proscribes corrupt practices without distinction to whether it is "committed by natural and

[479] Statute of the Council of Europe (European Treaty Series No. 1) conclude at London on 5th May 1949.
[480] Art 10 of the Statute of the Council of Europe 1949.
[481] Art 22 provides that "the Parliamentary Assembly is the deliberative organ of the Council of Europe. It shall debate matters within its competence under this Statute and present its conclusions, in the form of recommendations, to the Committee of Ministers."
[482] Art15 (a) of the Statute of the Council of Europe.
[483] (European Treaty Series No. 173) Done at Strasbourg on the 27th January 1999.
[484] (European Treaty Series No. 37) Done at Warsaw on 16 May 2005, was previously published as Miscellaneous No. 7 (2008) Cm 7465, it entered into force in the UK on 1 April 2009.
[485] (European Treaty Series No. 196) Done at Warsaw on the 16th May 2005.
[486] (European Treaty Series No. 172) Done at Strasbourg on the 4th November 1998.

legal persons."[487] It recognize corporate scheme, and this is provided for in terms of article 18. The consequence, in terms of enforcement, is that it obligates member states to "[a]dopt legislative measures to ensure that offending corporations can be held liable for the criminal offence of active bribery, trading in influence and money laundering".[488]It further lays the requirements that should be fulfilled for the corporation to be held criminally liable. These requirements include: first, the crime should have been committed by a human being (servant) – and by extension, the human being could be acting alone or in corroboration with the corporation. Second, the act that constitutes a crime, as a requirement, should be for the benefit of the company.

Third, the natural person must occupy a leading position within the corporation. In order to determine whether this requirement is fulfilled – due consideration is paid to the "[p]ower of representation of legal person or to such a natural person's authority to take decisions on behalf of the corporation or to such natural person's authority of control within the corporations."[489] Fourth, a corporation may be held criminally liable if the natural person, assessed objectively, did not consider reasonable measures to avert the harm or crime. In contrast, the inclusion or adoption of effective measures within the corporation's policies aimed at preventing corruption may suffice as mitigating factor but not as defence. The other observation is that in terms of article 18(3) the criminal liability attributed to the corporation by no means immunises or bar the institution of criminal proceedings against the natural person for the same act for which the corporation was held criminally liable.

The *Council of Europe Convention on the Prevention of Terrorism* (European Treaty Series 196) proscribe acts of terror committed by legal persons, and it creates several offences including: staffing with the object to supply such staff to terrorism schemes; making

[487] Art 1(d) Council of Europe Criminal Law Convention on Corruption 1999 defines a 'legal person' to "mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organizations."
[488] Article 18(1) of the Council of Europe Criminal Law Convention on Corruption.
[489] Art 18(1) of the Council of Europe Criminal Law Convention on Corruption, 1999.

provisions for training (tactical or otherwise) to enhance terror activities, and so forth. It makes provision and recognize corporate scheme as it is anticipated article 10 which provides that "State parties shall adopt such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal entities for the participation in the offences set forth in article 5 to 7 and 9 of this Convention".[490] The type of corporate liability contemplated in terms of article 10 above includes "criminal liability, civil or administrative".[491] The inclusion of other form of liability such as civil and administrative is to ensure that the wrongful conducts of corporations are punished in countries that do not recognize corporate criminal scheme.

The *Council of Europe Convention on the Protection of the Environment through Criminal Law* (European Treaty Series 172), in its preamble expressly recognizes that the captainship character revealed businesses in industrial development is not infallible,[492] – thus, implicitly, this entails that companies can commit the proscribed conduct. Therefore, corporate conduct requires appropriate regulations that are effectively responsive. The European Treaty Series 172 is distinguishable from the two Conventions discussed above (European Treaty Series 191 and 196) because it advances a perception that to effectively deter corporations from committing environmental crimes, criminal sanctions should be part of the equation. In this regard it provides that "whilst the prevention of the impairment of the environment must be achieved primarily through other measures, criminal law has an important part to play in protecting the environment".[493]

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[490] Art 10 of the Council of Europe Convention on the Prevention of Terrorism (European Treaty Series No. 196) Done at Warsaw on the 16th May 2005.

[491] Council of Europe Convention on the Prevention of Terrorism (European Treaty Series No. 196) Done at Warsaw on the 16th May 2005.

[492] Paras 4 and 6 of the Preamble of the Council of Europe Convention on the Protection of the Environment through Criminal Law 1998.

[493] Para 7 of the Preamble of Council of Europe Convention on the Protection of the Environment through Criminal Law.

This perception buttresses an argument that the stigma attached to a criminal sanction is greater than that which is attached to civil or administrative sanctions. The principal provision that enumerates corporate liability under the European Treaty Series 172 is article 9 which encourages state parties to make provisions, in their domestic laws, legal mechanism to ensure the liability of companies for the violations perpetrated as contemplated in terms of its article 2 if the offence was committed intentionally, or article 3, if the offence was committed negligently.

The *Council of Europe Convention on Acting against Trafficking in Human Beings* (European Treaty Series 37 of 2012) recognizes and includes corporate liability in its text in which it obliges state parties to adopt legislative and other measures to ensure that companies can be held to criminally account for the crime of "trafficking in human beings."[494] Notably, the requirements that must be satisfied for purposes of holding corporations criminal liable are identical to the requirements contained in European Treaty Series 191 which proscribes acts of corruption. Apart from obliging state parties to adopt legislative measures for purposes of establishing trafficking in human beings as an offence,[495] it further and specifically obliges state parties to develop legislation that obliges commercial carriers and transportation companies to put in place corporate measures to combat trafficking in human beings.[496]Moreover, this Convention provides factors or conditions that may be applied by the prosecution as aggravating circumstances, including circumstances "where an offence was committed within the framework of a criminal organization."[497]

In sum, all these conventions oblige state parties to put in place effective laws or other measures to ensure that companies are held to, preferably, criminally account for their involvement in the offences enumerated in these conventions. The manner of sanctioning a

[494] Art 22 the Council of Europe Convention on Acting against Trafficking in Human Beings of 2005.
[495] Arts 5(2) and 18.
[496] Art 7(3).
[497] Art 24(d).

legal person is required to be consistent with punishment that is effective, proportionate and dissuasive. [498]

3 8 Conclusion

The genesis of the principle of corporate criminal accountability from the Nuremberg trials, through the Rome Conference, the Kampala Review Conference and beyond appears not to end any time soon. The Nuremberg trials as initiator of group liability under international criminal law, only managed to achieve sanctioning corporations indirectly, namely by declaring corporations as criminal organisations as opposed to finding such corporations guilty for complicity in the commission of atrocities. The reason for providing corporate liability under the Nuremberg Charter was to allow national courts of the Allied Powers to prosecute individuals for membership in organisations that were declared criminal. The legal-historical value of this effort cannot be overstated.

The principle of corporate criminal liability was rejected at the Rome Conference debates. The subsequent Kampala Review Conference focused primarily on the crime of aggression to the exclusion of discussions on the principle of corporate criminal liability. Consequently, the ICC lacks the jurisdiction over companies who commit international crimes. However, despite the exclusion of corporate criminal liability under the purview of the ICC, it was demonstrated in this chapter that the examination of corporate criminal liability continues.

Considering the international and regional developments it can be concluded that there is significant support, in principle, to hold corporations liable, and liability in this context includes criminal liability. At the same time, it should be acknowledged that the picture is somewhat muddied by (a) the international tendency to not make corporate criminal liability and criminal sanctions *mandatory*, but rather optional together with other forms of liability

[498] Art 23(2).

(civil and administrative), (b) the diverse and sometimes contradictory way in which states incorporate into domestic law their international obligations to hold corporations liable for criminal conduct, and (c) the lack of international institutions and fora where companies can be tried for atrocity crimes. As for the last point (c), it should be mentioned that the Malabo Protocol of the AU represents a potential milestone in the advancement of corporate criminal scheme. However, there is still only very limited political and financial support for the envisaged “African Criminal Court” that would have jurisdiction over corporations accused of international and transnational crimes, including the atrocity crimes.

Chapter 4

Corporations and human rights violations

4 1 Introduction

The picture that has emerged thus far is mixed. There seems to be a clear international recognition that corporations should be accountable for international and transnational criminal conduct. It is acknowledged in international instruments that corporate criminal liability should at least be one of the modes of keeping corporations responsible (the other modes being administrative and civil liability). This acknowledgement is, however, diluted because of a lack of clear and mandatory international legal frameworks on the implementation of corporate criminal liability at the domestic level. Furthermore, the lack of domestic implementation is not remedied by strong international institutions with criminal jurisdiction over corporations and legal persons.

The post WWII efforts at the IMT Nuremberg and under the auspices of Control Council 10 in Germany were off to a promising start (with their pronouncements on criminal organisations and individual responsibility for prominent corporate leaders and industrialists), but none of the "Nuremberg legacies" (the *ad hoc* ICTs and the ICC) followed through with genuine corporate criminal liability as part of their jurisdictional regimes and modes of responsibility. The chequered state of affairs regarding corporate criminal accountability for atrocity crimes is further compounded by the legal-cultural divides in terms of how corporate criminal accountability is perceived and applied at the national level (if at all). There is a potential positive development in the form of the Malabo Protocol that envisages an African regional criminal court with comprehensive substantive jurisdiction and modes of responsibility that will include corporate criminal liability. But this court will not be a reality any time soon.

The question, then, is if there is a realistic way forward in terms of an international effort to hold companies accountable for atrocity crimes. The sobering conclusions from the previous three chapters should not be seen as a forgone conclusion about corporate criminal scheme for atrocity offences – at both the international and domestic levels. It is essential to go back in time and to view the issue from a normative vantage point. This is to look at the way in which human rights as normative driver has informed and is still informing a growing movement that seeks to hold companies to account for human rights abuses. At a certain level of seriousness human rights violations become atrocity crimes. Even though the tentative conclusion from the preceding chapters seems to be that legal and institutional efforts to hold businesses to be criminally liable for atrocity crimes (at both the international and national levels) has stalled. This Chapter will argues that the human rights imperative serves as a driving force for the eventual inclusion of corporate criminal charge as a mode of responsibility in the Rome Statute.

This chapter analyses the phenomenon of corporate participation in human rights violations. This is done to illustrate why it is necessary to elevate corporate responsibility to the criminal sphere, especially when "human rights violations are of a serious or systematic nature."[499] In the first place, the chapter discusses, briefly, the concept of human rights, its development and recognition under international and domestic law. The chapter will also illustrate the normative nexus between international human rights law and international criminal law. Secondly, the analysis of the chapter departs from the long held traditional approach that corporations are not obliged to respect human rights – that is, limiting it to states. The chapter includes a discussion on businesses' obligations to promote, respect and protect human rights.

[499] It must be pointed out that undeniably, when correctly understood from the context of gross human rights violations – the would be drafter of Rome Statute (amendment) may be persuaded to strive for the inclusion of a corporate charge under the ICC.

It is demonstrated that there are various ways in which corporations may commit atrocities. Finally, to place the discussion of corporate and human rights abuses in its proper context, the chapter include the analysis of case studies such as the Unocal, the Talisman Energy Inc and the Shell Nigeria matters.

4 2 Human rights and its development

The primary object of this dissertation is to determine whether corporations should be punished for international crimes. With this object in mind, and in order to place the discussion into context, this section includes a discussion on human rights. The discussion on human rights attempts to demonstrate the interrelation amongst "international human rights law, international humanitarian law and international criminal law."[500] Further, demonstrates how corporations may violate the principles enshrined in these branches of international law.

From the onset, it is acknowledged that the concept of what we would today recognize as human rights stretches back in memory and chequered history.[501] The focus in this

[500] In this section, it is recognized that these branches of international law are distinct from each other yet are so close enough that they are used as triggers or their violations may be construed as criminal.

[501] C Devine, C R Hansen & R Wilde *Human Rights: The Essential Reference* (1999) 4. Explains that the origin, formalisation and the inception of the concept of human rights at domestic level date back to the 19th century. However, notwithstanding the formalisation and inception period, the idea of human rights can be traced as far back in human history as 700 years Before Christ (700 BC). Arguably, since 700 BC the philosophy of human rights, although with less significance, continued to exist at domestic level and was perfected by the stages of civilization. The Greek philosophers recognized the role and rights of an individual within the society and they advocated for a universal standard of ethical conduct. Plato 472 – 348 BC devised the concept of common good which advocated for equal rights of man during war and peace time. Some of the scholars such as D Acemoglu & A Wolitzky "The Economics of Labor Coercion" (2011) 79 *Econometrica* 555 600; D Acemoglu, C Garcia-Jimeno & J A Robinson "Finding Eldorado: Slavery and Long-Run Development in Colombia" (2012) 40 *Journal of Comparative Economics* 534 – 564; G Bertocchi "Growth, Colonization, and Institutional Development: In and Out of Africa" in O de La Grandville (ed) *Economic Growth and Development, Frontiers of Economics and Globalization Vol 11* 25 – 41; S L Engerman "The Extent of Slavery and Freedom Throughout the Ages, in the World as a Whole and in Major Subareas" in J S Simon (1996) *The State of Humanity* 171 – 171, are in agreement that the issues related to human rights abuses by rulers and political institutions of the ancient including business firms ignited the advocacy for equal rights and the human rights activism movement. For instance, one such human rights abuse was the use of slaves. Many institutions including family businesses of the ancient relied on slave trade and slavery for purposes of commercial farming, agricultural production and constructions. See, for example: B J Ciulla "Why is Business Talking about Ethics? Reflections on Foreign Conversations" (1991) 34(1) *California Management Review* 67

Chapter is, however, on the modern conception and inception of human rights and the involvement of companies in the violation thereof.

By way of explaining, the concept of '*human rights'* refers to the rights which human beings are entitled to by virtue of been human beings. Forsythe posits that human rights refer to the fundamental values "of a person that are necessary for a life with human dignity."[502] Thus, the characteristics of human rights includes they are not capable of being divided ("indivisible"), they rely on each other ("interdependent") and are acknowledge as human rights everywhere ("universal"). It is trite that corporations do not possess human rights in the full sense. However, corporations are juristic persons and for that reason they possess rights applicable to them under national and international law[503] as was demonstrated in Chapter 2 above.

4 2 1 Synopsis on human rights at domestic level

From the English tradition's perspective, the idea of human rights manifested in Magna Carta in 1215 and the Petition of Rights of 1628, which provided for certain limited rights.[504]These early examples of (limited) human rights posed no impediment on corporate behaviour that would today be viewed as human rights violations. This allowed the

67; N M Bin Ahmad "The Economic Globalization and its Threat to Human Rights", (2011) 2(19) *International Journal of Business and Social Science* 273 280 at 277 they posit that "calls for corporate responsibility and accountability have apparently been known throughout the development of TNCs as far back as Cicero in 44 BC." Despite the fact that slavery in ancient history was a vital tool or engine of development, it shortly became subject of condemnation by many ancient human rights activists including Plato's work. The natural law school of thought including Stoics held a view that slavery was not natural and that a slave could be "free in his own mind", consequently slavery was considered to be against the tenets of natural law. For further literature on this argument, see, Devine et al *Human Rights* 6. Suffice to state that influenced by the Greek philosophers, the Roman philosophers developed natural law further and advocated for universal rights for all. The Romans in attempt to treat everyone equal, among others, adopted laws which provided that freed slaves were entitled to citizenship and were eligible to occupy "[h]igh positions of authority".

[502] D P Forsythe *Human rights in International relations* (2000) 3. M Goodale "Locating rights, envisioning law between the global and local" in M Goodale & S E Merry *The practice of human rights: Tracking law between the global and the local* (2007) 7 postulates that "[h]uman rights are a set of universal claims to safeguard human dignity from illegitimate coercion. Further that human rights are equal, inalienable and universal."

[503] Bernard (1984) *Criminology* 4.

[504] For example, "[n]o freeman shall be arrested, or detained in prison or deprived of his freehold except by the lawful judgment of his peers or by the law of his land."

corporations, including the world's first real multinationals such as the British and Dutch East India Companies[505] to enjoy impunity for crimes such as forced labour.[506]

Under the influence of Enlightenment thinkers, more comprehensive declarations and statements followed the early examples of rights declarations, such as *Magna Carta*. The USA to adopt the *Declaration of Independence* in 1776. It inspired France to adopt the *French Declaration of the Rights of Man* in 1789. These instruments were the first notable instruments that met the contemporary definition of the concept of human rights at domestic level. They formed the bedrock "for the respect, protection and promotion of human rights"[507], albeit incrementally. For example, the USA's Thirteenth Constitutional Amendment of 1865 abolished enslavement. The effect of the abolishment of enslavement was not only limited to the elite of the time who owned slaves, but it included the banishment of slavery in commercial farms and the use of slaves in any business institutions. The abolishment of slavery at the domestic level and the slave trade at the international level are early examples of the normative effect of human rights on commercial and corporate practices.

The protection of human rights is now a key feature of democratic systems all over the world. In the post- WWII and post-colonial world, Bills of Rights were introduced for the protection and promotion of human rights. Human rights also impacted on the development of all areas of law, including international law. The nexus amid human rights, and international criminal law is unmistakable.[508]

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[505] It was formed in 1602 and historically, it is considered the first major multinational company which possessed territorial powers and influence on negotiation of treaties, wagging of war, enslavement, imprisonment and execution of prisoners.

[506] J Lucassen "A Multinational and its Labour Force: The Dutch East India Company, 1595 -1795" (2004) *66 International Labour and Working – Class History* 12 14 posits that "the unfree workers from Asia and Africa were acquired through purchase or lease of slaves and forced employment of the local population."; for a general discussion on the Dutch slave trade, see, P C Emmer *The Dutch Slave Trade 1500 – 1850* (2006); J L Price "Review of the Dutch Slave Trade 1500 – 1850" *545 Reviews in History* 1-4, Available at <http://www.history.ac.uk/reviews/review/545#comment-0> (accessed 2017/01/ 26).

[507] The protect, respect and promote are the current common nomenclatures in the field of human rights.

[508] Y Kocar "The relationship between international human rights law and international humanitarian law in situations of armed conflict" (2015) 5(10) *Human Rights Review*, 109 112.

4 2 2 Synopsis on human rights at international level

As noted, the post-Second World War and post-colonial international order is to large extent structured around conflict prevention and the advancement of human rights and security. The international community, through the international institutions such as the UN and associated bodies like the ICJ, developed various systems and mechanisms that condemned the violation of human rights. From a legal point of view one can note the adoption of numerous international human rights instruments, such as the *Universal Declaration of Human Rights* (UNUDHR)[509], *International Covenant on Civil and Political Rights* (ICCPR)[510], *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* (UNCNSLWH)[511], *International Convention on the Suppression and Punishment of the Crime of Apartheid*[512], the *Convention on the Rights of the Child,*[513] and several others covering issues such as racial discrimination, torture, women's rights, and refugees.[514]

The UNUDHR became the first enabling instrument that contained the modern definition of human rights under international law and it refuted the totalitarian regimes' disrespect for human rights. Following the inception of the UDHR, numerous other international instruments that purported to promote human rights were adopted.[515] Inferences may be drawn from these instruments that the obligation to respect human rights contemplated

[509] GA Res 217 A(III) of 10 Dec 1948.
[510] 999 UNTS 171, 6 ILM 368 (1967).
[511] GA Res 2391 (XXIII) 1968.
[512] GA Res 3068 (XXVIII) 1974, 13 ILM 50 (1974).
[513] GA Res 25/44 1989, 28 ILM 1448 (1989).
[514] For a comprehensive discussion of the legal frameworks and current case studies on international human rights, see J Donnelly & D Whelan *International Human Rights* (2018).
[515] UNICCPR – with its Optional Protocol Available at <http://www.un.org.tr/human-rights-instruments> (accessed on 2017/01/22); UNICERD, Available at <http://www.un.org.tr/human-rights-instruments> (accessed on 2017/01/22; UNCAT available at <http://www.un.org.tr/human-rights-instruments> (accessed on 2017/01/22); United Nations Declaration on the Protection of All Persons from Enforced Disappearance, adopted by United Nations General Assembly in Resolution 47/133 of 18 December 1992; United Nations International Convention for the Protection of all Persons from Enforced Disappearance, adopted by the United Nations General Assembly on 20 December 2006 and it came into force on 23 December 2010, Available at <http://www.un.org.tr/human-rights-instruments> (accessed on 2017/01/22).

therein may implicitly include corporations' obligations to respect human rights. For instance, the UNUDHR preamble makes reference to *every organ of society*,[516] which, as it is demonstrated below, may be construed positively that *organ of society* may encompass corporations.

Although international human rights law may be construed to apply to natural and corporate persons alike, it is the case that human rights for corporations are still largely viewed as soft law and aspirational. Relevant (non-binding) instruments in this regard are the OECD *Guidelines on Multinationals*,[517] and the *UN Guiding Principles on Business and Human Rights* (2011).[518] Other initiatives are even softer ("super-soft", in the words of Professor Mark Pieth[519]). These include initiatives like the UN Global Compact, which is "a non-binding United Nations pact to encourage businesses worldwide to adopt sustainable and socially responsible policies, and to report on their implementation."[520] One should, however, not be cynical about these efforts. They point to a recognition that human rights are increasingly important in policy and legal terms. From a business perspective, "compliance" may mean many things, including quality control, ethics, worker rights, customer satisfaction – without losing sight of the bottom line – profitability. For purposes of this dissertation, "compliance" (should) mean compliance with a normative and legal framework subject to effective enforcement mechanism. In other words, compliance must ultimately move from the voluntary, "soft law" paradigm to a paradigm of enforcement

[516] UNUDHR Preamble provide that "the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."

[517] The non-binding guidelines cover a wide range of due diligence aspects, for instance the elimination of child labour and other potential human rights violations. Available at <http://mneguidelines.oecd.org/guidelines/> (accessed 2019/07/15).

[518] Available at <https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf.> (accessed 2019/07/15).

[519] M Pieth "Corporate compliance and human rights" *Criminal Law Forum* (2018) 595-601, at 597.

[520] Available at <https://www.unglobalcompact.org/> (accessed 2019/04/12).

premised on responsibility for wrongdoers and consequences for the guilty, i.e. the paradigm of criminal law.

Without losing sight of the argument at hand, another important point here, when discussing human rights violation and international criminal law, is to briefly determine whether, there is a possible link between human rights violations and atrocity crimes (crimes against humanity, genocide, and war crimes)? At what point does the violation of human rights constitute an atrocity crime, if any? In *Katanga and Ngudjolo Chui*, the Pre-Trial Chamber considered the link between human rights violations and international crimes. In this case, international crimes could not be divorced from human rights violations and it is evident that the link lays on the *seriousness* of the violation, the Chamber stated that international crimes are:

> "considered as a serious violation of (…) basic rights pertaining to human beings, drawn from the norms of international human rights law (…).[521]

Further link between human rights violation and international criminal law can be observed[522] in terms of the Rome Statute – which defines the proscribed conduct (crime of persecution) with reference to human rights violation and it provides as follows:

> "Persecution" means the intentional and *severe deprivation of fundamental rights* contrary to international law by reason of the identity of the group or collectivity."[523]

It is not every violation of human rights that amount to international crimes – rather the degree of the violation may render (qualify) it to be construed as an international crime. For instance, there should be a serious or grave breach of human rights to an extent that the said violations can shock the foundational values or conscious of the international

[521] *Prosecutor v Katanga and Ngudjolo Chui*, ICC-01/04-01/07-717 decision of the Pre-Trial Chamber 30/09/2008 at par 431.
[522] The Draft Code of Crimes against the Peace and Security of Human Kind of 1984 – in its 1991 version the *crimes against humanity* was replaced with *'systematic or mass violation of human rights'*. The fact that the international community interchangeably used the concept of *mass violation of human rights* with *crimes against humanity* – it is an indication that these concepts are to some extent inseparable.
[523] Article 7(2)(g) of the Rome Statute of the ICC.

community. This could entail “destruction in whole or in part” or “widespread or systematic attacks” aimed at a civilian population.[524] From this brief overview – it resonates that there is strong argument that can be raised in favour of the link between human rights violation and atrocity crimes. Further that the degree (seriousness) of human rights violation may render such human rights violation to be considered as an atrocity crime.

Since it was already established in prior chapters that corporate criminal liability is recognized at the national level, but not yet at the international (institutional and enforcement) level, the task at hand is to see whether the “soft law” human rights imperative can drive the argument for effective “hard law” corporate criminal liability at the international level. The points of departure for this discussion is to establish the extent to which corporations are bound by human rights obligations (if at all).

4 3 Corporate obligations to respect human rights

It is trite to state that gross human rights violations can amount to offences under international law, on condition that all the elements of the offence are satisfied (threshold of seriousness, contextual elements, *actus reus*, and *mens rea*).[525]This dissertation is not concerned with the elements of any of the specific atrocity crimes, but rather with the issue of liability in principle, and corporate liability specifically. So the angle in this section is not so much the contents of human rights norms, but the question as to whether companies are, in principle bound by (international) human rights. An answer in the affirmative can then help to construct a stronger case for direct and effective international criminal liability for atrocity crimes committed or abetted by corporations.

[524] *Prosecutor v Lubanga* ICC-01/04-01/06-2842 Trial Chamber 1 Judgment concerning Article 74 dated 14 March 2012 at Par 911 the Chamber referred to “widespread serious human rights violation” as constituting an international crime.

[525] For a discussion, see JP Pérez-León Acevedo “The close relationship between serious human rights violations and crimes against humanity: International criminalization of serious abuses” (2017) *Anuario Mexicano de Derecho Internacional* Vol XVII 145-186.

Historically, states bore the obligation to protect and respect human rights. There were no legal instruments that expressly placed a duty on companies to respect human rights. This was because the early formed companies had no legal personality independent from their founders.[526] The change in corporations' legal personality as was discussed in Chapter 2 above, brought with it benefits (expanded rights) and corresponding obligations. The obligations, among others, include corporations' respect for human rights, upright governance, socially responsible and decent citizenry. The question is, however, if all of these obligations are really "hard law" obligations, or are they merely "soft law" guidelines, as was mentioned previously?

4 3 1 Sources of corporate obligations to respect human rights

Traditionally, the settled sources of international law include the "[t]reaties, international customary law, general principles of international law, judicial decisions and persuasive soft law."[527] Legal framework stand point, namely: corporations' obligation to uphold human rights – it is worth noting that currently there is no treaty, custom or general principles of international law that expressly bounds companies to respect human rights. This is regrettably so, notwithstanding the *jus cogens* nature of human rights[528] or the fact that

[526] E Engle "Extraterritorial Corporate Criminal Liability: A remedy for Human Rights Violation?" (2006) *20 St John's Legal Comment* 287 288.

[527] Art 38(1) of the Statute of the ICJ 1945.

[528] The principles of IHRL and IHL falls under *jus cogens*, as H U Rehman, S R S Gilani & M H Khan "A critical assessment of *jus cogens* nature of international human rights law" (2014) *The Dialogue* 404 at 406-407 argues that "human rights are being considered of superior status in the normative hierarchy of international law: firstly, article 1(3), 56 and 103 of the UN Charter read together, give the meaning that member states of UN are under obligation to contribute to the accomplishment of international cooperation for promoting and encouraging respect for human rights and fundamental freedoms for all. This obligation prevails over any other obligation incurred under any other international agreement. Secondly, article 53 of the Vienna Convention on the Law of Treaty invalidates any treaty that which violates a peremptory norm of general international law."; Further see, discussion on *jus cogens* nature of human rights in literature by, A Bianchi "Human rights and the magic of *jus cogens*" (2008) 19(3) *The European Journal of International Law* 491-508 at 492 argues that "certainly, the identification of the content of the normative category of *jus cognes* has never been an easy process. However, human rights rules have been almost invariably designated as part of it. This has occurred either by way of general reference to the bulk of contemporary human rights prescriptions without any further qualification, or more frequently, by invoking the peremptory character of particular human rights obligation such as the prohibition of slavery, torture and genocide."; P Zenovic "Human rights enforcement via

corporations are capable of committing grave violations of human rights. One must therefore conclude that the current source of corporations' obligation to respect human rights under international law is limited to soft law.[529]

The question as to whether corporations should have a duty to respect international human rights has been a subject of much debate. One of the reasons for this debate is that it is assumed that states carry primary duty to respect human rights.[530] Further, that placing an obligation on corporations to respect international human rights may implicitly confer corporations with *locus standi* rights under international law and subsequently formalising corporations as legal subjects of international law[531] – which is perceived to be directly contrary to traditional international law principles of state centeredness.[532] This rationale led to diverse opinions on the issue. Some scholars argue for a stratification of duties to respect human rights, namely primary and secondary duties.[533]

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peremptory norms- a challenge to state sovereignty" (2012) 6 *Riga Graduate School of Law Research* 1-65 at page 32 observes that "the legal form of multilateral treaties, especially those concerned with human rights, has significantly changed. In our contemporary international legal order, the multilateral treaty making process is legislative in objective but contractual in method. That is how non-derogable norms emerging from treaties almost universally accepted, adopted by a majority of states within either a global or regional treaty regime, have become the norms of *jus cogens*. That would be the case with the prohibition of genocide, torture and inhuman or degrading treatment as well as the right to self-determination (…) in these cases *jus cogens* has a significant effect on human rights endorsement: it spreads the compelling character of the norm to states which are not signatories of a certain regional or universal legal framework."

[529] Kyriakakis (2008) *Criminal Law Forum* 144.

[530] B Bilchitz "The necessity for a Business and Human Right Treaty," (2016) *Vol 1(2) Business and Human Rights Journal* 204-227 at 206 posits is that "if states are required by international law to ensure that third parties (including corporations) comply with binding human rights requirements, then this entails that the third parties are themselves obligated to comply with such requirements. Further that, the logic of state's duty to protect at international law – entails the notion that non state actors have a binding legal obligations with respect to the human rights contained in these treaties."

[531] See, Gotzmann (2008) *QLSR* 36 46.

[532] Dugard *International Law* 1 argues that international law traditionally concerns itself with the conduct of the states in relation to each other. Thus, he defines international law as the "body of rules and principles which are binding upon states in their relations with one another." However, it is worth noting that this traditional or classical position of international law is not cast in stone, that is, in the 1940s an exception was allowed which elevated international institutions such as the UN and its agencies to be subject of international law.

[533] Bilchitz (2016) *BHRJ* 208. It is argued that States has the primary function to ensure the protection of human rights – reasons, among others, including that most binding international instruments are contracted by states and require such contracting states to ensure that third parties within the jurisdiction of such contracting states comply with binding human rights instruments – arguably, these third parties includes transnational corporations.

The classification entail that *states* are the primary protector of human rights (as of a duty) in contrast to *corporations'* oblique duty. Ruggie critique the stratification model and argues that "[i]t places emphasise on the wrong side of the equation in the sense that it concerns itself with a limited list of rights linked to imprecise and expensive responsibilities, rather than defining the specific responsibilities of companies with regard to all rights".[534] Which brings one to the question of whether there is support for the notion that corporations should have broad obligations akin to the obligations that states carry under international law.

A starting point was the efforts to bind corporations to respect human rights that date back to the early 1970s, namely the proposals on a "business and human rights treaty."[535] By 1982, the UN in its reaction to complaints of corporations' human rights violations, through the *Economic and Social Council*, passed Resolution 86/1982, which mandated the Intergovernmental Working Group to draft the "Code of Conduct for Transnational Corporations." The object of the Code of Conduct was to provide for *voluntary* business responsibilities related to respect for human rights. However, this draft code of conduct was not adopted. There were several other initiatives that were explored by the UN and other international organisations to regulate the activities of transnational corporations in relations to human rights abuses. These initiatives included the UN Global Compact principles,[536] OECD Guidelines for Multinational Enterprises[537] and the International Labour Organization

[534]J Ruggie "Protect, Respect and Remedy: A framework for Business and Human Rights" (7 April 2008), 15 Document A/HRC/8/5 Available at <http://business-humanrights.org/site/default/file/reports-and-materials/Ruggie-report-7-April-2008.pdf> (accessed on 2017/01/23).

[535] See, Bilchitz (216) *BHRJ* 206.

[536] UN Global Impact is a voluntary initiative (policy and practical framework) for companies that was launched on 26 July 2000 in New York by the UN Secretary General.

[537] The Declaration and Guidelines were adopted by OECD in 1976, revised in 1979, 1982, 1984, 1991, 2000 and 2011.

Tripartite Declaration of Principles Concerning Multinational Enterprises.[538] All these instruments are based on *voluntary* corporate compliance approaches.[539]

There has been much criticism against these voluntary compliance mechanisms, including that these voluntary compliance mechanisms are not satisfactory because the corporation has latitude to weigh the cost of non-compliance against compliance. If the costs for non-compliance are lesser than the cost of compliance, corporations may be tempted to opt for non-compliance.[540] Lyon underscores this argument and state that "self-regulation can be welfare-enhancing, but only if industry can make credible commitments that are backed up by rigorous third party monitoring schemes, something that is only likely to happen when there is strong regulatory threat."[541]

The dissatisfaction with voluntary compliance initiatives, according to Bilchitz, led in 2003 to the UN Sub Commission on Human Rights' to *Draft Norms on Responsibilities of Transnational Corporations and Other Business Enterprises*[542] *("UN Draft Norms on Corporations")* These norms contemplated to place a binding obligation on companies to protect and respect human rights.[543] Among the most significant features of these norms,

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[538] Adopted by the Governing Body of the International Labour Office at its 204th session in 1977 Geneva, and amended at its 279 (November 2000), 295 (March 2006) and 329 (March 2017) Sessions.

[539] OECD Guidelines For Multinational Enterprises (2011) Art I(1) Concepts and Principles expressly provide that "the guidelines are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws and internationally recognized standards. Observance of the guidelines by enterprises is voluntary and not legally enforceable. (…)."

[540] J T Scholz "Voluntary compliance and regulatory enforcement" (1984) 6(4) *Law and Policy* 387-404.

[541] T Lyon "The pros and cons of voluntary approaches to environmental regulation" (2013) available at <https://pdfs.semanticscholars.org> (accessed on 2018/4/29); D Matisoff "Sources of specification error in assessment of voluntary environment programs: Understanding program impacts" (2015) 48(1) *Policy Sciences* 109-126.

[542] Bilchitz (2016) *BHRJ* 206

[543] The Preamble of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, United Nations Document E/CN.4/Sub.2/2003/12/Rev.2(2003) para 4 provides among others that "[t]ransnational corporations and other business enterprises, their officers and persons working for them are also obliged to respect generally recognized responsibilities and norms in United Nations Treaties and other international instruments such as the Convention on the Prevention and Punishment of Crime of Genocide, the UNCAT; the Slavery Convention and Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery; The International Convention on the Elimination of All Forms of Racial Discrimination."

was their departure from the traditional voluntary compliance to non-voluntary enforcement mechanism.[544] These norms were a step in the right direction for purposes of requiring companies to account for human rights abuses. Miretski and Bachmann opined that "these norms were of a far-reaching character that included a duty laid on [transnational corporations] to impose human rights obligations upon States, even if States failed to ratify the human rights instruments establishing these duties".[545] Scholars argue that these norms were not adopted, because they contemplated to develop existing norms rather than actual codification thereof. The norms contemplated to recognise corporations as subjects of international law. This proposition placed or elevated companies to be on the same scale with states under international law.[546] This, clearly, is a radical and not universally palatable proposition.

The failure to adopt the UN Draft Norms on Corporations led the UN to develop and adopt the "*Protect, Respect and Remedy Framework.*" This initiative is, again, based on *voluntary* corporate compliance. This is not satisfactory. Corporations, as noted by Kinley, possess power, the machinery and agents of the global economy they wield enormous influence, especially in developing states. This fact calls for more than voluntary compliance schemes. The answer is to hold firms – criminally account for the human rights infringment.[547]

4 3 2 The current voluntary compliance framework briefly contextualised

The soft law sources identified above, despite their voluntary compliance approaches, can be viewed as normative pointers towards the eventual concretisation of corporations'

[544] Bilchitz (2016) *BHRJ* 207.
[545] P P Miretski & S D Bachmann "Global Business and Human Rights – The UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights – A Requiem" p3 at <http://eprints.lincoln.ac.uk/6272/1/Miretski_Bachmann_-_Business_and_Human_Rights.pdf.> (accessed on 2016/11/22).
[546] Miretski & Bachmann "Global Business and Human Rights" 6.
[547] D Kinley "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" (2004) 44 *Virginia Journal of International Law* 931 933.

positive obligations with respect to international human rights. These pointers are briefly enumerated below.

4 3 2 1 Duty to undertake human rights due diligence

Due diligence refers to sensible and practical actions or procedures undertaken to mitigate or avoid human rights infringement, crime or other harmful activities. This duty in business context is implicit in the "director's duty of care and skill" – which requires the directors of companies to, at all material times, act with certain appropriate standards of care and skill "when acting on behalf of a company."[548] In the context of companies and human rights, this duty require corporations to undertake reasonable measures to ensure that business activities which are conducted by corporations do not cause to adverse human rights impacts. The obligation to undertake human rights due diligence is a relatively new initiative in the international sphere and it falls under the broader principle of "corporate responsibility to respect human rights."[549]It is expressly provided for in Principle 17 which provides:

> "In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."[550]

[548] R T Langford, I Ramsay & Welsh M "The Origins of Company Directors' Statutory Duty of Care", (2015) *37 Sydney Law Review* 489 518 at 499.

[549] Principle 13 of the 2003 UN Guiding Principles on Business and Human Rights – provides that "the responsibility to respect human rights requires that business enterprises: a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impact."

[550] Similar provision exists in the text of the OECD Guidelines for Multinational Enterprises 2011 Edition, Article IV(5) which provide that "States have the duty to protect human rights. Enterprises should, within the framework of internationally recognized human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations: Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts."

Notwithstanding the fact that the obvious object of corporations is to make profit – their business activities are not immune from contributing or causing adverse human rights impacts. Therefore, corporations should strive to integrate human rights due diligence duties in their *enterprise risk-management system*. This entails that corporations must put in place mechanisms, including policies that reflect the corporations' commitment to protect and respect human rights.

Ruggie posits that in the process of executing the due diligence duty, corporations must be informed by or take into considerations three factors. These factors include firstly, considering the tendency of countries in which corporations conduct their businesses – to whether such countries respect human rights. Secondly, is to determine as to what human rights impacts the corporations' own business activities may pose. This consideration have attracted legal discourse and most of the scholars are in agreement that "[c]orporations are capable of impeding the realization of human rights, directly or indirectly, as a result of their own actions."[551] Thirdly, to determine whether the corporations' relationship with other enterprises, connected through business activities, may pose a negative impact on human rights.[552] Thus, the process of executing a due diligence duty include incorporation and integration of human rights statements in corporate policies, conducting human rights impact assessments and putting in place performance indicators to ensure a robust enforcement of the human rights policies.

4 3 2 2 Duty to undertake good corporate governance

The meaning of "corporate governance" is a subject of much debate in business law. This concept includes principles such as "corporate citizenship", "corporate social

[551] N Pillay "The Corporate Responsibility to Respect: A Human Rights Milestone" *Annual Labour and Social Policy Review* 4.

[552] J Ruggie Protect, Respect and Remedy: A framework for Business and Human Rights (2008), 17 Document A/HRC/8/5 at <http://business-humanrights.org/site/default/file/reports-and-materials/Ruggie-report-7-April-2008.pdf> (accessed on 2017/01/23).

responsibility" and "corporate ethics." The principle of corporate governance places a duty on corporations to adopt effective policies that are characterised by values including corporate responsibility, accountability, good ethical conduct and respect for human rights. In terms of the Code of Governance ("King IV") to which many South African, Namibian and Southern African corporations ascribe to, corporations are required to "consider not only the financial performance but also the impact of the company's operations on society and the environment."[553] Further, it encourages companies to be compliant with the laws and instruments that prescribe upholding human rights.[554]

The other aspect of "corporate governance" from which inference may be derived or that may persuasively reflect corporate duties to respect human rights: is corporate social responsibility (CSR). Traditionally, CSR in a broader sense, "[i]s concerned with 'what is' – or 'should be' – the relationship between global corporations, governments of countries and societies in which such corporations resides or operates."[555] Implicitly, this involves the altruistic character of corporations in contrast to selfish or utilitarian character. From the altruistic characteristic perspective, scholars argue that CSR should not be limited to philanthropic means. Rather as Davis argues that corporate social responsibility entails the "[c]orporations' consideration of, and response to, issues beyond the narrow economic, technical and legal requirements of the firm."[556] In this context, Davis opines that corporations are obliged to evaluate their decisions and to determine the effects of such decisions on society. Further, that corporate decisions should consider not only the profit or

[553] Principle 1 (1.2.1) of King IV Code of Governance (2009) at <http://www.iodsa.co.za/?kingIII> (accessed on 2017/01/ 22).

[554] Principle 6 (6.1.4) of King IV Code of Governance provide that "Compliance with applicable laws should be understood not only in terms of the obligations that they create, but also for the rights and protection that they afford."

[555] D Crowther & G Aras *Corporate Social Responsibility* (2008) 10.

[556] K Davis "The case for and against business assumption of social responsibility" (1973) *16 Academy of Management Journal* 312 312.

benefits obtained by the corporation; but such decisions should also include the interest of upoholding human rights of the society it operates in.

However, corporations tend to disregard this noble soft law obligation and consequently cause human rights violations in varying degrees. For instance, one can refer to the appalling Shell Petroleum Development Corporation's (SPDC) situation in Nigeria.[557] In this instance, the ACHPR found that the SPDC oil exploration operations in the Ogoni land contributed to the displacement and expulsion of the Ogoni People from their lands. The ACHPR held that "[t]he SPDC and the Nigerian government forces has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes. These actions constitute massive violations of human rights."[558]

It should be clear from the ACHPR finding that Shell, a giant multilateral corporation, not only violated several soft law good corporate governance rules and guidelines, but also contributed to serious and systematic human rights violations. A further case study, discussed below, will assist to put these issues in concrete perspective, especially as they pertain to serious human rights violations.

4 4 Corporations and human rights violations – modes of responsibility and a few case studies

Findings and reports on corporate involvement in infringement and abuse of human rights like Shell/Nigeria matter referred to above, prompted commentators to construct the notion: "*corporate responsibility for gross human rights violations*" in a more systematic way. I will refer to this with reference to a few case studies. Hughes-Jennett, Karmel, Zerk and Powel identified four ways modes of potential corporate responsibility for gross human rights

[557] *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria* (2001) ("*Social and Economic Rights*") African Human Rights Law Report 60, Communication 155/1996, African Commission on Human and Peoples' Rights.
[558] *Social and Economic Rights* para 62.

violations, namely: (a) as primary perpetrator; (b) as supplier of goods and services that are used in an abusive manner; (c) provision of information that exacerbates abuse; and (d) through investment or conduct of companies in nations with meagre democracy and human rights accounts.[559] I will now turn to case studies to illustrate these suggested modes of responsibility.

4 4 1 Unocal and Total (Myanmar) case

Unocal Company with its parent company, the Union Oil Company, is registered in California USA and Total Company is registered in France. Their business interests and operations extend beyond the borders of states in which they are registered, and it is safe to say that they are both prime examples of multinational companies in the natural resources field. These two companies both had, at all relevant times, oil extraction interests in Myanmar. Unocal Corporation obtained a concession from Myanmar government for oil extraction.[560] In order to extract the oil, a pipeline had to be constructed. Unocal was responsible for the construction of the Yadana gas pipeline, which traversed through the Tenasserim region.[561]

The consequences of constructing the gas pipeline included requiring the residents of Tenasserim region to move from their villages and fields to make way for the construction of the pipeline. The residents were unwilling to move from their villages and fields. Unocal and Total subsequently contracted the Myanmar military for purposes of overcoming the resistance and to provide security during the construction. The Myanmar military forces were hired notwithstanding their previous poor records in terms of human rights. These multinational companies provided funding for military operations, transportations and other

[559] J Hughes-Jennett, R Karmel, J Zerk & S Powel "Corporate responsibility for international crimes" (2005) *The Royal Institute of International Affairs* at <https://www.chathamhouse.org> (accessed on 2018/04/28).
[560] A J Wilson "Beyond Unocal: Conceptual problems in using international norms to hold transnational corporations liable under the Alien Tort Claims Act" in O de Schutter (eds) *Transnational corporations and human rights* (2006) 55.
[561] Wilson "Beyond Unocal" in *Transnational Corporations* 56.

essential materials to enable the military to conduct regular patrols within the concession areas.

During the tenure of service of the military forces in Tenasserim region, several human rights abuses were recorded. The claims of human rights infringement made by the residents of Tenasserim region included rape of women and children, destruction of farming fields and villages, plundering of properties, forced labour, "torture and killing of persons by the Myanmar military"[562] The companies were aware of the allegations of human rights abuse but there were no corrective measures that were taken from the companies' side to avoid the gross human rights violations.

Unocal and Total Corporations were sued in September 1996 under the USA's Alien Tort Claim Act 1789[563] (ATCA) by the Myanmar nationals who were affected. The legal action was withdrawn by the plaintiffs, after the companies offered an out of court settlement in 2009.

4 4 2 Oriental Timber Company and Royal Timber Company case

This case study discusses two companies, namely, the Oriental Timber Company (OTC), its president been Mr Guus Kouwenhoven, and the Royal Timber Company (RTC), with its director also Mr Guus Kouwenhoven. These companies were registered in Liberia. Kouwenhoven was a Dutch national. The two companies teamed up with the Global Star Group of companies with registration office in Hong Kong. The primary business of these companies was logging and processing of timber.[564]They carried on their business in several nations, including Liberia and a number of Asian countries. The timber were extracted from

[562] *John Roe III; John Roe VII; John Roe VIII; John Roe X v Unocal Corporation; Union Oil Company of California* ("*John Roe*") D.C. No CV-96-06956 RSWL 14187 (395 F.3d 932b (9th Cir 2002).
[563] 28 US Code [USC] §1350.
[564] The Perspective "Investigative Report on Oriental Timber Corporation" (2000) available at <www.theperpective.org> (accessed on 2018/04/29).

Liberia and exported in its raw form to Asia and Europe. The former president of Liberia, Mr Charles Taylor, also had interests in these companies.

During Charles Taylor's presidency a rebellion was formed against the government and civil war erupted in Liberia. In order to stump the rebel group branded as *Liberian United for Reconciliation and Democracy* (LURD), the government required a supply of weapons, financial assistance, personnel and several other resources. Kouwenhoven, during 2000 to 2003 and in his quest to protect his business interests in Liberia, supplied weapons and several other materials, to President Charles Taylor and his armed forces that were essential to wage war against LURD.[565] The supply of weapons and other essential materials to Charles Taylor and his armed forces significantly increased Kouwenhoven's access to timber concessions to an extent that he was granted *de facto* control over a large portion of timber land around Buchanan port in South East Liberia.[566] Therefore, because of the continued support offered by Kouwenhoven in his capacity as president and director of the two companies under discussion, the timber business was sustained in Liberia.

The supply of weapons by OTC and RTC to Liberia was done notwithstanding the UNSC Resolution1342 of 2001 as well as 1408 of 2002. These resolutions prohibited and or placed a ban on the supply of weapons to Liberia. There were other instruments that prohibited the supply of weapons to Liberia, namely the European Union's Common Position 2001/357/CFSP[567] and the Netherlands' Sanctions Regulations.[568] The relevance of making reference to the Dutch regulations is that the OTC and RTC were of Dutch origin since they were owned by a Dutch national.

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[565] Global Witness "Bankrolling Brutality: Why European timber company DLH should be held to account for profiting from Liberian conflict timber" (2010) available at <www.globalwitness.org> (accessed on 2018/04/27).
[566] T B Van Solinge "Eco-crime: The tropical timber trade" in D Siegel & H Nelen *Organized crime: Culture, markets and policies* (2008) 97 111.
[567]Council Common Position of 7 May 2001 concerning restrictive measures in relation to Liberia (2001/357/CFSP).
[568] Netherlands – Liberia Sanctions Order No 137 of 2001 dated 18 July 2001 (Stc. 2001 No. 137).

The weapons and essential materials were shipped to Liberia by ships and vessels owned by OTC and RTC. These weapons on arrival were stored at the warehouses of OTC and RTC prior to the delivery and use by Charles Taylor and armed forces. Regrettably, these weapons were used in committing atrocities by the Charles Taylor's regime against civilians. In June 2006, criminal proceedings in the Netherlands were instituted against Kouwenhoven.[569] The indictment contained, among others, war crimes as well as illegal supply of weapons. Kouwenhoven was convicted for violating international humanitarian law (war crimes) in 201 and sentenced to nineteen years in prison. A fugitive from justice, he was later located in South Africa and the Netherlands subsequently requested his extradition.[570]

The successful war crimes prosecution against Kouwenhoven has echoes of the post-Second World War industrialists' prosecutions (*Krupp* et al). In terms of corporate complicity in the atrocity crimes committed in Liberia, it is clear that the focus on an individual – Kouwenhoven – represents only a partial victory for the proponents of corporate criminal accountability (the companies OTC and RTC of which Kouwenhoven was the director and driving force, were not prosecuted). The case against Kouwenhoven nevertheless represents – in the words of James Stewart – "a partial correction" for the curious regression in the post-Second World War recognition of corporate complicity in atrocity crimes.[571]

4 4 3 Nigeria Shell Petroleum Development Company case

The Royal Dutch Petroleum Company (RDPC) with registration office in the Netherlands had a joint venture with Shell Transport and Trading Company (STTC) with registration office in UK. The RDPC and STTC had extractive business interests in Nigeria since the 1950s,

[569] *The Public Prosecutor v Guus Kouwenhoven* ("*Kouwenhoven*") Case Number 220043306 (ECLI: NL: GHSGR: 2008:BC6068) Court of Appeal decision delivered on 21 April 2017, available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSHE:2017:2650> (accessed 2019/02/12).
[570] Reporting available at <https://www.news24.com/SouthAfrica/News/dutch-arms-dealers-extradition-papers-arrive-from-the-netherlands-20180525> (accessed 2019/02/12).
[571] JG Stewart "The historical importance of the Kouwenhoven trial", available at <http://jamesgstewart.com/the-historical-importance-of-the-kouwenhoven-trial/> (accessed 2019/02/19).

which led to the establishment of a joint subsidiary known as Shell Petroleum Development Company of Nigeria Limited (SPDCNL) with registration office in Nigeria. The SPDCNL on behalf of its parent companies conducted oil exploration and production in Ongoni land in Nigeria.[572]

The SPDCNL's operations in the late 1980s and early 1990s led the residents of Ongoni land to commence peaceful demonstrations against SPDCNL. In order to have a coordinated movement, the Ongoni people led by Ken Sao-Wiwa formed a group called: *Movement for the Survival of the Ongoni People* (MOSOP). The concerns raised by MOSOP, among others, were the environmental effects caused by the extraction and production of oil; and the forced relocation of people from their farms and villages to pave way for the oil pipeline that was excavated within the Ongoni land.[573]

In order to overcome the resistance and thwart the demonstrations, the SPDCNL contracted the Nigerian military and the police forces to provide security at production sites. These security forces were compensated by SPDCNL for the security services provided. SPDCNL further made provisions for sufficient funding, accommodations and meals to ensure that the security forces conducted raids effectively. These raids were characterised with brutality, rape against women and children, torture, extrajudicial killings, forced removal of the Ongoni land residents, looting, plunder and destruction of properties owned by the Ongoni people.[574] SPDCNL effectively monitored the movements of the Ongoni people and that of MOSOP. Further, SPDCNL paid bribes, including promises of job offers to witnesses who were involved in the production of fabricated evidence which resulted the conviction

[572] *Ester Kiobel and Others v Royal Dutch Petroleum Co, and Others* ("*Ester Kiobel and Others*") Case No. 569 US (2013) Decision of the Supreme Court of the United States of America delivered on 17 April 2013 at page 2.
[573] *Ester Kiobel and Others* 3.
[574] *Ester Kiobel and Others* 3.

and punishment of the MOSOP leaders and their subsequent executions.[575] Some of the Ongoni land residents sought political asylum in other countries.

Legal actions by persons who were affected were brought against SPDCNL together with its parent companies in the USA through the instrumentality of the Alien Tort Act of 1789.[576] The legal action was withdrawn in 2010 after an out of court settlement in the amount of US$ 11, 000, 000. 00.[577] Of interest for present purposes is the clear claims of business collaboration in the commission of "widespread" and "systematic" infringement of human rights and the commission of atrocities in Nigeria that informed the case before the US court.

4 4 4 Talisman energy Inc case

Talisman Energy Inc was a company that was incorporated in Canada and its business interests included extraction and processing of oil. It had its business operations in several countries including in Sudan. In 1998, it concluded a takeover agreement with Arakis Company which had oil concessions in Southern Sudan.[578]

The area on which Talisman held a concession was occupied by Sudanese natives. In order for Talisman Energy Inc to maximise the potential in its extraction of oil, certain villages were required to move and relocate elsewhere. This proved difficult because the natives were not willing to leave their fields and villages. Talisman Energy Inc enlisted the services of the Sudanese Army to provide security. The Sudanese Army were financially supported by Talisman Energy Inc, which further constructed an airport runway as well as helicopter apron to facilitate military operations within the concession area.

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[575] *Social and Economic Rights* at para 5.

[576] *Wiwa v Shell Petroleum Development Company Nigeria* ("*Wiwa*") Case No 08-1803-cv (2009).

[577] See, Order of Court in *Ken Wiwa and Others v Shell Petroleum and Others (Ken Wiwa and Others")* Case No. 96 Civ 8386 (KMW)(HBP) dated 8 June 2009 by the US District Court of New York.

[578] S J Kobrin "Oil and politics: Talisman Energy and Sudan" (2004) 36 *International Law and Politics* 426 at 437.

The Sudanese Army committed gross human rights violations against the Sudanese civilians, including rape, forced removal and displacement, torture, destruction of homes and properties, murder and mass killing of the non-Muslim people who resided in the oil-rich fields off Khartoum. It was further alleged that Talisman Energy's complicity and participation human rights infringement (atrocity crimes) served to gain a business advantage or concession.[579]

The victims of these infringements, together with the Presbyterian Church of Sudan, brought an action against Talisman Energy Inc under the ATCA in the USA. The case was registered as *Talisman Energy*. The claims were clear that the company conspired with the Sudanese government to commit a series of abuses. The Court of Appeal dismissed the legal action against Talisman Energy Inc in 2009 in the USA. The cause for the discharge of the case included that the plaintiffs failed on paper to prove that there were sufficient facts to support the allegations that Talisman Energy "aided and abetted the commission of atrocities in Sudan."[580]

4 4 5 Anvil mining case

Anvil Mining Limited was registered in Canada. It had business operations and offices in Perth, Australia, Montreal, Canada, and in the Democratic Republic of Congo (DRC). In the DRC it was based in Dikulushi area where it operated a copper and silver mine. In 2004, the rebel groups seized and took control of the town of Kilwa which is about 50 kilometres from the Dikulushi area. Government forces, in an attempt to gain control over Kilwa, obtained assistance from Anvil Mining Company. Anvil Mining provided the Congolese military with vehicles, chartering planes, and financing of military operations to enable the military to

[579] *The Presbyterian Church of Sudan v Talisman Energy Inc,* ("*Talisman Energy*") Docket No. 07-0016- CV Judgment of 2 October 2009, 7.

[580] *Talisman Energy* available at <http://www.internationalcrimesdatabase.org/Case/43/Presbyterian-Church-Of-Sudan-v-Talisman-Energy/> (accessed 2017/02/12).

effectively dismantle the rebellion.[581] Some of the vehicles provided by Anvil Mining Company were allegedly used to transport apprehended rebels. Some of the facilities of Anvil Mining were used as interrogation rooms in which the apprehended rebels were subjected to torture and extrajudicial killings at the hands of the military forces.

Non-Governmental Organisations (NGOs) and the UN Mission to the DRC intervened and launched an investigation on behalf of the victims. In 2006, criminal proceedings were instituted against the military personnel by Lubumbashi Military High Court. Three employees of Anvil mining company were cited as accused persons for their complicity in atrocities. In 2007, the charges were dismissed. The dismissal of the charges in the DRC led the victims to sue Anvil mining company in Canada.[582] A legal action (class suit) was brought in Quebec, Canada. The action was dismissed in 2012 because Quebec courts lacked jurisdiction to adjudicate the matter.

The claim was then brought to the African Commission on Human and Peoples' Rights (the Commission).[583] The Commission's decision was delivered in June 2016 in which the DRC was found to be answerable for gross human rights infringements that were committed in Kilwa. This decision went further to implore the DRC to indict and punish the employees of Anvil mining company for their participation in the commission of atrocities.

Again, we can see the clear corporate link to the atrocity crimes that were committed. In law, the focus turned out to be on natural persons as perpetrators and accomplices, but the corporate involvement *de facto* is clear from the reported facts on the ground.

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[581] A McBeth "Crushed by an Anvil: A case study on responsibility in the extractive sector" (2014) 11(1) *Yale Human Rights and Development Journal* 127 at 131.

[582] *Association Canadienne Contre l'impunite v Anvil Mining Limited* ("*Anvil Mining*") Case No.34733 (Qc)(Civ) decision of the Supreme Court delivered on 01 November 2012.

[583] *Institute for Human Rights and Development in Africa and Others v Democratic Republic of Congo* ("Institute for Human Rights") Communication 393/10 African Commission on Human and People's Rights decision adopted during the 20th Extraordinary Session of the African Commission on Human and People's Rights held from 9-18 June 2016, Banjul, The Gambia.

4 5 Conclusion

The case studies discussed in the preceding section illustrate the *de facto*; if not *de jure*, responsibility of corporations in alleged and occasionally proven cases of atrocity crimes and gross human rights violations. I will now proceed, in the next chapter, to put these case studies and reports of business institutions' engrossment in grave human rights infringement in criminal law perspective. In particular, the crucial elements of corporate *actus reus* and *mens rea* will be discussed with an eye on constructing a framework for corporate criminal liability for atrocity crimes.

Chapter 5

Forms of corporate criminal responsibility: attribution of *actus reus* and *mens rea* for international crimes to corporations

5 1 Introduction

This chapter, firstly, critically analyses two important approaches that are relevant for purposes of imputing conduct and attributing fault to juristic persons, namely the nominalist and realist approaches. The nominalist (derivative) approach encompasses principles such as identification, aggregation and vicarious liability as methods through which corporations may be held liable. In contradistinction, the realist approach[584] which entails that corporations may account for atrocities committed based on the principle of corporate culture. Secondly, the chapter discusses the element of unlawful conduct from corporate perspective and provide an insight into the requirements that must be fulfilled in order to construe corporate *actus reus*. Thirdly, it analyses the concept of *mens rea* from the corporate perspective. This section departs from the orthodox approach of construing corporate *mens rea* and proposes certain requirements that must be satisfied for purposes of inferring corporate *mens rea*. In this manner, the chapter attempts to introduce new forms of corporate criminal responsibility, based on corporate culture, for purposes of corporate liability for atrocity crimes. Finally, the chapter analyses the models of criminal accountability as contemplated by the Rome Statute and how they can potentially relate to corporations.

[584] Pop "Criminal Liability of Corporations" (2009) 18 summarises the rationale of Realists Approach on Corporate Criminal Responsibility and posits that "[i]nitially, some argued that corporations cannot be held criminally liable because, unlike human beings who are true subjects of law, corporations are legal fictions. This argument was abandoned because the existence of the corporations is an incontestable reality in social, economic, and juridical life of the society. Nowadays, corporations have legal capacity in the majority of areas of law, own real property and goods distinct from those of their members and have their own rights and obligations. Thus, it would be at least bizarre to accept that a corporation is a reality when it is harmed by others, but not when it violates the rights of other persons."

5 2 Corporate conduct

The conceptual meaning of *unlawful conduct*, in our criminal law legal framework, is understood to be broad enough to include positive conduct and negative conduct. These two forms of conduct are discussed below.

5 2 1 Positive conduct

Positive conduct refers to the actual performance of an act.[585] It is common knowledge that criminal law does not necessarily prohibit abstract acts. Rather the prohibited acts are limited to acts that are enumerated in the definitional elements of crimes.[586] Burchell posits that a person can be said to have carried out an act if "there have been some external or physical manifestation of the accused's thoughts."[587] From the descriptions above, positive conduct can be said to manifest through, among others, utterances of words or voluntary movement of body parts (muscles).[588] In this context, it resonates that criminal responsibility cannot attach based on mere evil thoughts of a person. Rather, the evil thoughts must be manifested through action in order for criminal responsibility to attach.[589] There is scholarly agreement that this type of conduct is relatively easy to establish and as such does not necessarily pose challenges when contrasted with negative conduct.[590] The discussion on negative conduct is provided below.

5 2 2 Negative conduct

Omission literally means to omit something. It is often construed as failure to positively do something or failure to act positively.[591] Negative conduct invokes imperative norms

[585] Kemp *et el Criminal Law* 44.
[586] Snyman CR *Criminal Law 6 ed* (2014) 52.
[587] J Burchell *South African Criminal Law and Procedure: General principles of Criminal Law* (2011) 72.
[588] Snyman *Criminal Law* 52.
[589] *S v Milne and Others* 1951 (1) SA 791 (A) at 822 (South Africa).
[590] Burchell *Criminal Law* 73.
[591] Kemp *et al Criminal Law* 44.

which places a duty on a person to act positively. Therefore, for liability to attach based on omission, the legal question that needs to be addressed is to establish if the accused had a legal duty to act positively? Prior to unpacking this question, it is important to note that different domestic criminal laws treat omissions differently. Some states provide for a general rule of liability based on omission, whereas other states do not.[592]

Burchell contend that the "[l]egal systems that do not require action to prevent others from harm must envisage exceptional circumstances where a legal duty to act may arise."[593] These exceptional circumstances can be identified with due regard to several factors: presence of a statutory duty on accused to render assistance; the accused's prior positive conduct; the accused must have been in a protective relationship with the victim; and control of dangerous property.[594] The discussion on how liability may attach based on these exceptional circumstances (categories of liability for omission) in the context of corporate conduct is provided below.

5 2 2 1 Prior positive conduct

Prior positive conduct occurs when a person through his or her positive conduct creates a condition that is injurious to others.[595] Responsibility under this category attaches because of the *omission per commissionem* rule. This rule proffers that the author of an injurious condition has responsibility to avert such condition before it actually materialises or before it causes harm against another.[596] Prior conduct has its origins from civil law. Burchell posits that this was "[o]ne of the early situations under which a legal duty could arise."[597] This rule

[592] See, Burchell *Criminal Law* 74 who posits that "in France, the duty to provide assistance to an endangered person when such assistance is possible without danger to the persons providing the assistance or others is codified. Similarly, the penal codes of Belgium, Germany, Italy, Greece and Poland make it an offence to fail to render reasonable aid in case of danger. However, Anglo-American and Canada contains no general rule duty to intervene."
[593] Burchell *Criminal Law* 75.
[594] Kemp *et al Criminal Law* 46-48; Burchell *Criminal Law* 78-88.
[595] Burchell *Criminal Law* 78.
[596] Kemp *et al Criminal Law* 47.
[597] Burchell *Criminal Law* 78.

found its application in criminal matters. In *R v Miller*[598] ("*Miller*")the court found Miller responsible for failing to extinguish the fire which started as the consequences of his action. In this case Miller had a burning cigarette when he went to bed. When he awoke, he noted that there was a small fire which was started by his lighted cigarette. He just stood up and moved to the next room and slept. The room burned. Miller was prosecuted and the prosecution based its case on the fact that Miller had knowledge of the fire which he started and that without cause failed to take preventative measures to extinguish it. The court found that Miller created a dangerous situation; consequently, he owed a duty after becoming aware of the situation to take measures to prevent and put off the fire. Lord Diplock held that:

> "(…) I see no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence."[599]

In the context of corporate criminal responsibility, *omission per commissionem* rule may be applied with reference to corporate activities that are related to their normal business activities, for instance the extractive industries. A body corporate that extracts oil and then detects oil spills but fails to take preventative measures to avoid further oil spills from causing harm, will be responsible based on prior positive conduct. The failure on the part of the corporation to take measures that are necessary to extinguish the harm it created may lead to liability to attach against such a corporation.

The other example may be situations where a company deals in the production and storage of hazardous substances. By virtue of producing and storing the harmful substances, the corporation owe a duty to train or give adequate training to its employees

[598] [1983] 2 AC 161 decision of the House of the Lords.
[599] *Miller* at 176.

on how to manage hazardous substances and to ensure the availability of suitable storage facilities. If the storage facility is of substandard and/ or a small leak is detected, instead of desisting from storing in a leaking facility, the corporation continues to use such leaking facility without taking corrective measure to prevent further leakage, such corporation may be liable. Liability here attaches because the corporation created a situation by the production of the hazardous substance and after detecting a small leak, it failed to take corrective measures.

5 2 2 2 Protective relationship

The responsibility to act positively may come into being, at the instance of a "*protective relationship*". This may be in form of natural or contractual relationship. Natural relationships may bring about a legal duty to protect because of the relationship between family members, for example parent and child relationship or other forms of family relationships.[600] The other form of protective relationship is contractual relationship. It refers to a relationship that comes into being through an agreement[601]. An employer and employee relationship is an example of such relationship which is created through an agreement. The employer (including corporations) by virtue of the employment agreement has a legal duty to ensure that there is a safe and conducive working environment; and that the employees are not exposed to detrimental or dangerous situations at the workplace.[602] For example an employer (corporation) has a duty to provide a safe workplace and that employees are not

[600] Kemp *et al Criminal Law* 48-49.
[601] Burchell *Criminal Law* 79.
[602] *Slager v Commonwealth Edison Co* 595 NE 2d 1097 (Ill App Ct 1992) there was a strike at the premises of the employer. The deceased employee did not take part in the strike. When he was leaving the workplace, his car was struck with a picket sign. The deceased panicked and accelerated, but unfortunately, he collided into a truck and he died at workplace site. In this matter the court found that the employer owed "a duty to provide a safe working environment to employees" during strike.

exposed to harm practices.[603] In the event of the corporation's failure to render relevant protection, it may incur liability.[604]

5 2 2 3 Control of a potentially dangerous thing

A person who deals with dangerous things is required to ensure that those dangerous things do not cause harm to third parties.[605] Dangerous things may include vicious animals, chemical weapons, toxic substances, arms and ammunitions, and so forth.[606] The legal duty arises on the grounds of a person's control over the dangerous thing.

5 2 2 4 Statutory duty

An obligation to act positively in order to avoid harm may arise from the provision(s) of legislation, constitutions, statutes, bilateral or multilateral agreements. Kemp *et el* posits that if a duty is imposed by a statute, two consequences may ensue, namely: liability may attach though non-compliance with the provision of a given statute; and further that anyone who does not to conform with the provisions of a statute may be liable for the harm caused by failure to act positively.[607] At the domestic level, constitutions and bills of rights may provide for legal duties on both legal and natural persons to promote and protect human rights.[608] This legal duty requires persons to prevent human rights violations. Liability may attach where persons fail to comply. These liabilities may include criminal sanctions.[609]

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[603] D F Burke "When employees are vulnerable: Employers are too" (2000) *The National Law Journa*l available at <www.semmes.com> (accessed on 2018/04/02).

[604] S Beaver "Beyond the exclusivity rule: Employer's liability for workplace violence" (1997) 18 (1) *Marquette Law Review* 103 124.

[605] J E Aversa "Liability of responsible parties for hazardous waste cleanup: CERCLA section 107 liability after one decade" (1991) 1(2) *Villanova Environmental Law Journal* 563-580.

[606] Kemp *et al Criminal Law* 47.

[607] Kemp *et al Criminal Law* 46.

[608] Art 5 of the Namibian Constitution.

[609] See, Kemp *et el Criminal Law* 47 who posits that "statutory frameworks aimed at combating complex criminal phenomena, such as money laundering, organised crime, and financing of terrorism, often provide for legal duties, coupled with the criminalisation of failure to comply with such duties."

5 2 3 Unlawful conduct

As was stated above, criminal law does not concern itself with lawful conduct. Rather, it deals with conduct that is construed to be unlawful or that violates the criminal code. Therefore, under criminal law and for purposes of establishing corporate criminal responsibility, the analysis is centred on the unlawful conduct. The unlawful conduct or *actus reus* in Latin is described as the "external or objective element of an offence"[610] which comprises all the physical elements of a crime and it excludes the mental state of the offender.[611] The orthodox approach to unlawful conduct – be it for strict liability, formally or materially defined crimes – is that there are certain requirements that must be satisfied for responsibility to attach. These requirements include that conduct must be (a) proscribed by law, (b) authored by a human being (human conduct), and (c) voluntary.[612] It is common knowledge that criminal responsibility does not attach to involuntary acts which may occur as a result of automatism, somnambulism and epilepsy.[613]

To stretch a little further and as it was demonstrated in Chapters 2 and 3 of this dissertation, in addition to unlawful conduct requirements stated above, it is settled law under international criminal law that criminal responsibility is primarily individual.[614] Under these circumstances, a number of questions may arise such as how does one establish corporate unlawful conduct? Who commits such unlawful conduct? If such unlawful conduct

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[610] S Oded *Corporate Compliance: New Approaches to Regulatory Enforcement* (2013) 110.

[611] K Ambos "What does Intent to Destroy in Genocide Mean?" (2009) *91(876) International Review of the Red Cross* 833 834; D M Greenfield "The Crime of Complicity in Genocide: How the International Criminal Tribunal for Rwanda and Yugoslavia Got It Wrong and Why it Matters" (2008) *98(3) Journal of Criminal Law and Criminology* 921 931.

[612] Kemp *et al Criminal Law* 31; Burchell *Criminal Law* 68 defines voluntary conduct as "a conduct which is controlled by the will or conduct that is controlled by the accused's conscious will or subject to his or her self-control. Even an omission, or failure to act, must be voluntary in this sense."

[613] Burchell *Criminal Law and Procedure* 69.

[614] *Prosecutor v Du [Ko Tadi]* IT-94-1-T, Delivered on 7 May 1997 at Para 665 "it is well recognized that the principle of individual responsibility and punishment for crimes under international law recognized at Nuremberg is the cornerstone of international criminal law. This principle is the enduring legacy of the Nuremberg Charter and judgment which gives meaning to the prohibition of crimes under international law by ensuring that the individuals who commit such crimes incur responsibility and are liable to punishment."

is committed by another person other than the corporation – how and what are the conditions that must be satisfied for such other person's unlawful conduct to be imputed on the corporation? Are there any other models of criminal responsibility that may be resorted to, or best applied to construe corporate unlawful conduct without predicate same to a corporate agent? Corporations are, of course, abstract persons without soul, mind, hands, or physical body parts for them to personally commit any unlawful conduct. I will now turn to two theoretical approaches to explain corporate *actus reus*.

5 3 Nominalist vs. Realist approaches to corporate *actus reus*

The proponents of the nominalist approach argue that a corporation cannot, on its own, commit any conduct, except through its human employees. Cavanagh supports this proposition and argue that "a company is nothing more than a collection of individuals."[615] Implicitly, the theoretical basis for the nominalist approach entails that a corporation's conduct cannot be distinguished from the acts of its employees. This approach assumes that only natural persons (directors and employees) are capable of acting and their conduct may be imputed onto the corporation through the derivative model.[616]

The derivative model encompasses but is not limited to agency (vicarious liability), aggregation and the identification theory.[617] These theories are not identical. For instance, for a servant's unlawful conduct to be imputed on the corporation through vicarious liability, there are several requirements that must be satisfied including, proving the relationship between the corporation and the employee (employment relationship), the scope of employment; and that the employee was furthering the corporation's interest.[618] The

[615] Cavanagh (2011) *Journal of Criminal Law* 414.
[616] Jordaan (2003) *Acta Juridica* at 48 Explains that derivative model entails that the "state has to prove that an agent or servant of the corporate body, acting within the scope of his or her employment or authority or while furthering the interests of the corporate body, committed a crime. The unlawful act and culpability of the individual servant or agent are then imputed to the corporate body."
[617] N Cross *Criminal Law and Criminal Justice: An Introduction* (2010) 73.
[618] *Ex Parte Minister of Justice: in re R v Nanabhani* (1939) AD 427 at 431.

identification theory can be distinguished from vicarious liability, in the sense that the former exclude the conduct of employees in non-managerial positions and seek to impute the conduct of senior officials "who may be deemed to be the directing mind and will of the corporation.[619]

The aggregation theory is distinguishable from both vicarious liability and identification theory. It assumes a holistic approach, in the sense that it takes into consideration the conduct of all possible participants, the circumstances surrounding the conduct and it is premised on collective responsibility.[620] In contrast, unlike the nominalist approach, the realist approach at *actus reus* level share similar elements as the nominalist approach. In fact, the realist approach concedes, with qualification, that "it is required that *actus reus* of an offence must be performed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his employment."[621] This concession is said to be qualified because the *actus reus* of the agent or employee of a corporation is considered and deemed as a formal requirement desired by a corporation.[622] The *actus reus* of employees may be manifested as the result of the corporate policy. This proposition is discussed in detail below. Suffice to state that the lack of equal bargaining power between corporations and individual employees is one of the factors that reduces or diminishes the autonomy of an individual to nothing more than an instrument at the behest of a corporation.[623]

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[619] *HL Bolton (Engineering) Co. Ltd v Graham and Sons Ltd* [1956] 3 All ER 624, CA the court found explained that "The person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company."

[620] Jordaan (2003) *Acta Juridica* 59.

[621] Jordaan (2003) *Acta Juridica* 64; Nana (2011) *55(1) JAL 1*03.

[622] Cavanagh (2011) *Journal of Criminal Law* 414; Nana (2011) *JAL* 103 argues that "the tendency at present should be to seek to hold corporations liable for criminal acts that may be considered acts that are particular to the corporation itself, that is acts in breach of criminal law standards that result from the operation of an existing policy or the way the corporation's activities are managed or organized."

[623] K Li, D Griffin, H Yue & L Zhao "How does culture influence corporate risk-taking?" (2013) *23 Journal of Corporate Finance* 1 22.

Further contradistinction between these approaches lies in *mens rea* as will shortly be demonstrated below when *mens rea* is discussed. In a nutshell, at *actus reus* level these approaches are in agreement, though with qualification, that a natural person may be deemed to constitute a body part of a corporation for purposes of performing the *actus reus*. In *H L Bolton (Engineering) Co Ltd v TJ Graham and Sons Ltd*[624] ("Bolton and Graham") the court made an analogy that:

> "A company may in many ways be likened to a human body. (…) Some of the people in the company are mere servants and agents who are nothing more than hands to do the work (…)."[625]

As was demonstrated in Chapter 2 above, at national level, the unlawful conduct of a corporation is derived from the conduct of agents or servant of such a corporation. This contention is evidenced and supported by several comparative domestic legislation, to name a few: the Italian Legislative Decree 231 of 2001 establishes that a corporation can only perform the *actus reus* through a physical person,[626]the Namibian Criminal Procedure Act, Act 51 of 1977, requires that for responsibility to attach to a corporation there must be an "act performed by a director or servant of such a corporate body."[627]

As for international criminal law, one can note that the practice of agents to act in the interest of an organisation or external entity is not foreign to international criminal law. In *Prosecutor v Jean-Pierre Bemba Gombo*[628] ("*Jean-Pierre Bemba*") the tribunal, in establishing the guilt of Bemba, noted that the combatants who were directly involved in the

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[624] [1957] 1 QB 159.

[625] *H L Bolton (Engineering) Co. Ltd v T J Graham and Sons Ltd* [1957] 1 QB 159 at 172.

[626] Art 7 Legislative Decree of 2001 of Italy; C Cravetto & E Zanelda "Corporate Criminal Liability in Italy: Criteria for Ascribing *Actus Reus* and Unintetional Crimes", in D Brodowski, M E Monteros de la Parra, K Tiedemann & J Vogel (eds) *Regulating Corporate Criminal Liability*. (2014) 110 posits that "the Decree establish two different criteria for the attribution of the *actus reus* to legal entity depending on the role that the agent has in the organisational chart of the company (a) when a physical person is an individual in subordinate position the attribution of responsibility is structured on the idea of organisational fault and the burden of proof is on the prosecution. (b) when the author of the crime carries a representative, administrative or directive duties the responsibility of the company is structured on identification principle with a strict liability mechanism."

[627] Section 332(1) of Criminal Procedure Act, Act 51 of 1977 (Namibia).

[628] ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Rome Statute – delivered on 21 March 2016.

commission of murders, raping women and children and assaults against victims as well as plundering and looting of properties were merely instruments of the *Mouvement de libération du Congo* (MLC) which Bemba had effective control and authority over in his capacity as President and Commander-in-Chief of its military wing *Armée de libération du Congo* (ALC). The tribunal started:

> "The Chamber therefore finds beyond reasonable doubt that the attack was committed pursuant to or in furtherance of the organisational policy."[629]

This decision demonstrates that because of the MLC's organisational policies which authorized and or encouraged plundering and looting as means of combatants' self-payment the combatants, by their own volition, would not have committed the atrocities in question. In support of this contention, the Trial Chamber III in *Jean-Pierre Bemba* further found that:

> "[I]n light of the above factors, taken together, any suggestion that the crimes were the result of an uncoordinated and spontaneous decision of the perpetrators *(combatants)* acting in isolation *(and at their own volition)*, is not a reasonable conclusion to be drawn from the evidence."[630]Emphasis added in italics.

It should be noted that Bemba was, at a later stage, acquitted on appeal by ICC.[631] The acquittal was based, *inter alia*, on the Appeals Chamber's assessment that Bemba could not account on the premise on command responsibility because the Trial Chamber made a serious error when assessing the question whether Bemba took reasonable steps to avert crimes at the instance of his subordinates in the MLC.[632] This acquittal does not, however, nullify the accepted theoretical position on the elements of command responsibility. At the

[629] *Jean-Pierre Bemba* para 687.
[630] Para 685.
[631] *Prosecutor v Jean-Pierre Bemba Gombo,* Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "judgment pursuant to Article 74 of the Statute", Case No ICC-01/05-01/08 A (8 June 2018).
[632] Paras 189-194.

same time, cases like *Bemba* confirms the position that currently, in terms of the Rome Statute, the imputation of unlawful conduct of a natural person onto an abstract entity (be it a corporation, or some other form of organisation like the MLC *in casu* Bemba) is not recognized as acceptable modes of responsibility under the Rome Statute.

The ICC recognizes that unlawful conduct of a natural person may be imputed onto another natural person for purposes of establishing criminal liability. And such imputation may then be casted in different modes of responsibility, for instance "command responsibility", "joint criminal enterprise" (JCE), and so on. Thus, the imputation of *actus reus* as was demonstrated above may be effected through the instrumentality of a common plan,[633] JCE,[634] or command/ superior responsibility.[635] These modes of responsibility provide a premise or enable a legal process for imputing one person's conduct onto another person. In *Prosecutor v Du [Ko Tadi]*[636] the ICTY tribunal deemed correct to adopt with approval the decision of the *Trial of Otto Sandrock and Three Others*[637] in which the court held that:

> "Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group, may be received as *prima facie* evidence of the responsibility of each member of that unit or group for that crime."[638]

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[633] *Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidéle Babala Wandu and Narcisse Arido* ("*Bemba and Others*") ICC-01/05-01/13 Trial Chamber VII, Judgment Pursuant to Article 74 of Rome Statute, Delivered on 19 October 2016 par 62; *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06, Decision on the Confirmation of Charges, delivered on 27 January 2007, paragraph 326.

[634] *Prosecutor v Vasiljević* IT-98-32-T Judgment delivered on 29 November 2002, para 63.

[635] M E Badar "The mental element in the Rome Statute of the International Criminal Court: A commentary from a comparative criminal law perspective" (2008) 19(3) *Criminal Law Forum* 473 512.

[636] IT-94-1-T Judgment delivered on 7 May 1997.

[637] *Trial of Otto Sandrock and Three Others,* Vol I *Law Reports* 35, 43 (1947); *Gustav Becker, Wilhelm Weber and 18 Others*, Vol II *Law Reports*, 67 70.

[638] *Prosecutor v Du[Ko Tadi]* para 685.

Moreover, for there to be a reciprocal imputation of *actus reus* it must be proved, as was found by the Trial Chamber in *Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidéle Babala Wandu and Narcisse Arido,*[639] (*Bemba and Others*) that:

> "The accused and at least one other individual worked together in the commission of the offence on the basis of an agreement or common plan. It is this common plan that ties the co-perpetrators together and justifies reciprocal imputation of their respective acts."[640]

The command responsibility principle[641] at *actus reus* level is much distinct when compared to both the common plan modality and JCE. Unlike common plan and JCE, which may require both positive and negative conduct and which assumed – at least at first glance – a horizontal relationship between the participants, command responsibility require the negative conduct (omission)[642] to occur in a vertical relationship. The command and or superior responsibility principle as prescribed by the Rome Statute of the ICC is the closest responsibility principle to that of master-servant principle (the derivative model) in the context of corporate criminal liability.

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[639] ICC-01/05-01/13 Trial Chamber VII, Judgment Pursuant to Article 74 of Rome Statute, Delivered on 19 October 2016.

[640] Para 65.

[641] I Bantekas "The Contemporary Law of Superior Responsibility", (1999) 93(3) *The American Journal of International Law* 573 573 argue that Superior/ Command responsibility assumes that "a combination of power to intervene, knowledge of crimes and subsequent failure to act should render those concerned liable for the crimes of their subordinates."; Art 28 of the Rome Statute of the ICC distinguishes responsibility for both military commanders and superiors. The command/superior responsibility include that – the commander/ superior "[m]ust have effective control or effective authority and control over the forces (subordinates) who committed the crime or about to commit the crime: for commanders, (a) the commander knew or should have known, (b) the commander failed to take all necessary and reasonable measures to prevent or repress their commission or submit the matter to the competent authority for investigation or prosecution. For superior responsibility principle it requires that - superior (a) either knew or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit the offence, (b) the crimes concerned activities that were within the effective responsibility and control of superior, and (c) the superior failed to take all necessary and reasonable measures to repress or submit the matter to competent authority for investigation and punishment."

[642] Bantekas (1999) *AJIL* 575.

5 4 New perspectives on corporate *actus reus*

Derived from the analyses made above and elsewhere in this dissertation, in relation to both the nominalist and realist approaches, it is apparent that either of the approaches may be applicable, at domestic level, in the process of attributing unlawful conduct to an offending corporation. Further, that there are commonalities in the requirements of conduct, such as conduct must be authored by a natural person; there must be a law that prohibit a given conduct, and that the conduct must be voluntary.

Despite these similarities, a series of questions may arise: Is it feasible for the principles of *actus reus* – more specifically, corporate *actus reus,* as practiced at domestic level to be supplanted and applied at international law level? Are the rules underpinning corporate *actus reus,* as practiced at domestic level, compatible with the tenets of ICL? If not, what type of modifications, if any, may be required for such rules to be compatible with the ICL?

Before unpacking these questions, it is important to first acknowledge that it is common knowledge that some of the international forums may apply domestic rules, as the circumstances may require, in settling international doctrinal debates.[643] The essence of this acknowledgment is to gainsay, as it is demonstrated below, that even though domestic principles form part of the sources of general international law – these domestic rules may not be adequate to supplant corporate *actus reus* as practiced at domestic level to an international forum.

There are distinct observations to be made regarding the element of *actus reus* as applied at domestic level, which may be capable of creating a disjoint between international and domestic criminal law. Firstly, corporate *actus reus* as a distinct element is recognized in some (arguably, most) domestic legal systems, however it is at present not recognized at international law level and certainly not at the ICC. Secondly, at international level, and

[643] See, Art 38(1)(C) of the Statute of the ICJ.

certainly at the ICC, unlawful conduct by one natural person can only be imputed on another natural person to the exclusion of corporations. In contrast, at domestic level, the unlawful conduct of a natural person may be imputed on another natural person and/or a legal person. Thirdly, at international level, and certainly at the ICC, the command / superior responsibility mode of responsibility is still premised on the conduct (often negative conduct) of natural persons and not the conduct of abstract entities.

These observations underscore the incompatibility of the current form of corporate *actus reus* under domestic criminal law with guidelines of *actus reus* at international criminal law level, and certainly as these are applied at the ICC. What remains to be analysed are the proposed rules that must be followed to ensure that the unlawful conduct which are allegedly committed by corporations are appropriately and effectively attributed on such corporations at the international level.

5 4 1 Proposed corporate actus reus requirements

The analysis in the preceding section highlighted the incompatibility of domestic rules on corporate *actus reus vis-à-vis* their application at international level. The rules proposed and discussed below are construed to be applicable at international criminal law and do not purport to be all encompassing. However, they are essential when viewed from the distinct international criminal law object of "putting an end to impunity" for perpetration of atrocity crimes. These proposed rules on *actus reus* pertaining to corporations are: (a) the conduct must be proscribed by law; (b) the conduct must be of a natural person; and (c) the conduct must be compliant with organisational policy. These proposed rules are not just discussed in abstract, but a hypothetical case study is also provided to demonstrate how these rules may be applied at the international level.

5 4 1 1 The conduct must be proscribed by law

Conventionally, before conduct can be construed to be unlawful, there must be a law that proscribe or prohibits that specific conduct. This is one of the pillars underpinning the legality principle. Kemp *et el* posits that legality entails "that no person should be subjected to punishment by the state, except for conduct that is clearly defined as a crime according to a valid and applicable law."[644] Therefore, it is illegal to punish a person for conduct that was not defined as a crime prior to its commission. Equally, even courts are not allowed to create new crimes in order to punish a person – rather the courts must interpret and apply the law that existed at the material time when the conduct was committed.[645]

International criminal law, the legality principle can be established through the availability of a custom or treaty which proscribes such conduct. In *Vasilijevic,*[646] the ICTY held that the "[r]equirements which must be met before a Trial Chamber may convict an accused for committing an offence under customary international law or treaty law, includes that the conduct in question is regarded as criminal under that body of law."[647] In essence, it is

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[644] Kemp et al *Criminal Law* 17. On the origin and background on the principle of legality and he posits that the "first formal statement of the principle of legality may be found in Article 8 of the French Declaration of the Rights of Man (1791), which held that no one may be punished except by virtue of a law established and promulgated before the crime and legally applied. This principle was further developed and introduced into Bavarian Penal Code of 1813 by the German jurist, Paul Johann Anselm Ritter von Feuerbach, who first coined the now well-known legal maxim *Nulla poena sine lege, nulla poena sine crimine, nullum crimen sine poena legali* – which means No punishment without law, no punishment without crime, no crime without lawful punishment."

[645] CR Snyman *Criminal Law Fifth Edition* (2008) 36 posits that one of the pillars of the of legality is "*nullum crimen sine lege"* which means "no crime without law." For this reason, he states that "an accused may not be found guilty of a crime and sentenced unless the type of conduct with which he is charged: (a) has been recognized by the law as a crime, (b) in clear terms, (c) before the conduct took place, (d) without the court having to stretch the meaning of the words and concepts in the definition to bring the particular conduct of the accused within the compass of the definition, and (e) after conviction the imposition of punishment also complies with the four principles sets out immediately above."; *Vasilijevic* para 196 Trial Chamber held that "the principle of *nullum crimen sine lege* does not prevent a court from interpreting and clarifying the elements of a particular crime. Nor does it preclude the progressive development of the law by the courts. But under no circumstances may the court create new criminal offence after the act charged against accused either by giving a definition to a crime which had none so far, thereby rendering it prosecutable and punishable, or criminalizing an act which had not until the present time been regarded as criminal."

[646] IT-98-32-T, Judgment delivered on 29 November 2002.

[647] Para 193.

imperative that there must be, in the first place, a clearly articulated law in existence that criminalise the conduct in question before such conduct may be deemed unlawful.[648] In respect of treaty law, to establish if such law existed prior to the conduct in question the courts need to be satisfied that, firstly the state was a party to such a treaty prior to the conduct.[649] Secondly, that such a treaty provides that a violation thereof triggers criminal responsibility.[650]

The Rome Statute embodies the tenets of the principle of legality and makes provision that an alleged offender cannot be prosecuted, unless at the time when the conduct in question was committed, such conduct was proscribed by the Rome Statute and was clearly defined as a crime.[651] It further expressly prohibits retroactivity or application of the Statute to acts which were performed before it came into force.[652]

5 4 1 2 The conduct must be of a natural person

A human act refers to any conscious deed executed by a human being or "the manner in which a person behaves"[653]. The requirement that conduct must be authored by a human being excludes from criminal accountability any conduct that may be authored by non-

[648] See, *Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T Delivered on 02 September 1998, para 605 "(…) the Chamber believes, an essential question which should be addressed at this stage is whether Article 4 of the Statute includes norms which did not, at the time the crimes alleged in the indictment were committed, form part of existing international customary law. Moreover, the Chamber recalls the establishment of the ICTR during which the UN Secretary General asserted that in application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of International Humanitarian law which are beyond any doubt of customary law."

[649] See, *Prosecutor v Clement Kayishima and Obed Ruzindana* ICTR-95-1-T, Judgment delivered on 21 May 1999 the Trial Chamber noted that "the Trial Chamber is cognizant of the ongoing discussions, in other forums, about whether the above mentioned instruments should be considered customary international law that imposes criminal liability for serious breaches. In the present case, such an analysis seems superfluous because the situation is rather clear. Rwanda became a party to the Conventions of 1949 on 5 May 1964 and to Protocol II on 19 November 1984. These instruments, therefore, were in force in the territory of Rwanda at the time when the tragic events took place within its borders."

[650] *Vasilijevic* para 193.

[651] Art 22 and 23 of the Rome Statute of the ICC.

[652] Art 24.

[653] English Oxford Living Dictionary available at <https://en.oxforddictionaries.com/defintion/conduct> (accessed on 2018/05/11).

human beings, for example, animals, machines (for instance fully automated systems) and natural occurrences, for instance natural disasters (so-called “acts of God”). Of course, insofar as animals, forces of nature of machines are manipulated by humans to cause certain events, that will still qualify as human conduct.[654]

Human conduct is indispensable to the successful prosecution of a corporation. This dissertation recognizes that a human being’s conduct is indispensable for the construction of corporate conduct, since corporations do not have the physical and intellectual capabilities to perform acts.[655] The bewildering possibilities presented by Artificial Intelligence (AI) falls beyond the scope of this dissertation, but it is acknowledged that AI may, in future, disrupt our present understanding of the limitations of corporate conduct and our current assumption that human conduct is an indispensable prerequisite for the construction of corporate *actus reus* and *mens rea*. It may very well be that in future corporations will be able to conduct their business on the basis of non-human decision-making, such as algorithmic or fully automated decision-making, leading to robotic conduct with real-world consequences. The ethical and legal implications of this will be immense and is already identified as such.[656] This will of course also impact the element of *mens rea*, and not only the conduct element.

In terms of our current reality, however, it is still realistic to construct corporate *actus reus* around the activities of humans, where humans are not mere pawns or robots, but humans in service or in charge of the corporation in question. In order for corporate activities to be carried out – it recruits and hire human beings who actually perform tasks and functions on behalf of the corporation.[657] Several contributions can be deduced from the SA’s Criminal

[654] Burchell *Criminal Law* 45.
[655] *R v Bennett & Co (Pty) Ltd* 1941 TPD 194.
[656] On the ethics of AI and related debates, see T Hagendorff at <https://arxiv.org/ftp/arxiv/papers/1903/1903.03425.pdf> (accessed 2019/03/20).
[657] *H L Bolton (Engineering)* 172

Procedure Act 51 of 1977 section 332(1) that contemplates to impute conduct performed by human beings onto a corporation for purposes of establishing a corporate charge:

> "(1) For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law–
>
> (a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and
>
> (b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,
>
> in the exercise of his powers or in the performance of his duties as such director or servant, or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by the corporate body, or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body."[658]

The link to the corporation is important because in order for a natural person's conduct to be imputed on the body corporate, there must be a relationship between such natural person and the corporation. This relationship can either be as a result of agency or employment as is demonstrated below.

5 4 1 3 Existence of agency/ employment relationship

The process of establishing employment relations may be determined by the definition of who is an employee and employer; and secondly by analysing the contract of employment. National laws will be useful tools in this regard, and the Namibian Labour Act[659], for instance, defines "employee" in the following terms:

[658] Sect 332(1) of the Criminal Procedure Act, Act 51 of 1977 (Republic of South Africa).
[659] Sect 1 of the Namibian Labour Act 11 of 2007.

> "An individual, other than an independent contractor, who: (a) works for another person and who receives, or is entitled to receive, any remuneration for that work; or (b) in any manner assists in carrying on or conducting the business of an employer."[660]

An employer is defined in the following terms:

> "Any person, including the state who: (a) employs or provides work for, an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual; or (b) permits an individual to assist that person in any manner in the carrying or, conducting that person's business."[661]

Derived from these definitions, it is apparent that the employer must be vested with authority to direct, instruct, supervise and ability to control the employee[662]and the employee ought to have been integrated in the employer's organisation.[663] From the contract perspective, conventionally, an employment contract may reveal whether a person is categorised as an employee or not. The other aspect that may be determined from the contract is whether the terms of the contract refer to the contract for services (independent contractor) or contract of service (employee). In a nutshell, the indicators that may help to identify an employee are multifaceted.[664] To this end the definition of employment relationship is contentious, and this dissertation does not discuss it in detail. Suffice to note the relevance of domestic legal sources, notably established labour laws and other relevant commercial transaction laws that may help to identify the existence of a more than incidental relationship between a natural and a corporate person.

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[660] Sect 1.

[661] Sect 1 of the Namibian Labour Act 11 of 2007.

[662] See, *Midway Two Engineering & Construction Services v Transnet Bpk* 1998 3 SA 17 (SCA).

[663] See, *Smit v Workmans Compensation Commissioner* 1979 1 SA 207 (A).

[664] See, *SA Broadcasting Corporation v McKenzie* 1999 20 ILJ 1936 (LAC) which laid down several factors that may be applied in establishing who an employee is. Some of these factors include: "if the contract purports to render personal service or for specific task, is the service rendered personally or through others, is the employee in a subordinate relation to the employer, etcetera."

This dissertation adopts the definition of employment relationship as propounded by Lewis *et al* who defines it with reference to "an economic, legal, social, psychological and political relationship in which employees devote their time and expertise to the interests of their employers in return for a range of personal financial and non-financial rewards."[665] The effect and relevance of identifying an employee or servant of a corporation is that it assists in the process of linking and imputing the wrongful conduct of an employee onto the corporation. Without this relationship, the conduct of a human being (servant) may not be imputed onto a body corporate.

Apart from employment relationship, the other method that may be applied to determine the principal's conduct is through the agency theory. The agency relationship is distinct from employment relationship. The former is premised on scope of authority and the latter is premised on scope of employment.[666] The classical form of agency "relates to situations in which one individual (called agent[667]) is engaged by another individual (called the principal) to act on his/her behalf based upon a designated fee schedule."[668] The agency and or employment relationship creates a buffer between a corporation and any other person who do not qualify as agents or employees of a corporation.

The effect of the buffer created by these relationships is to exclude the conduct of non-agents or non-employees from been imputed on the corporation. This means that the only conduct that may be imputed onto the corporation, are those conduct which are authored by agents or employees of the corporation. It is worth noting that the classical agency theory has progressed to a degree that it is no more limited to natural persons – rather it includes

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[665] P Lewis, A Thornhill & M Saunders *Employment Relations: Understanding the employment relationship* (2003) 6.

[666] D Neild "Vicarious liability and the employment rationale" (2013) 44 *VUWLR* 707 709.

[667] P Dalley "A theory of agency law" (2011) 72 *University of Pittsburgh Law Review* 495 500 defines an agent as "a person who has agreed to act on the principal's behalf and subject to the principal's control. The agent must hold the power to affect the principal's affairs in some ways."

[668] M Nomazi "Role of the agency theory in implementing management's control" (2013) 5(2) *Journal of Accounting and Taxation* 38 40.

that a legal person (agent corporation) can conclude an agency agreement with another legal person (principal corporation).[669]

Kultys posits that the agency theory may be invoked when discussing corporate liability because it is a "device that restricts agents' own interests and make them pursue the principals' interests."[670] In this context the agent's action has an effect on the relationship between the principal (corporation) and any other third party, for example a victim of a crime.[671] Scholars argue that a human being can act on the behalf of a company if there is an express or implied[672] or apparent[673] term authorising such natural person to perform functions on the behalf of a body corporate.[674] The express authority to perform the said functions – can be derived from an existing contract (written or oral) between a natural person and the company, for example a contract of employment.[675] The implied authority arises as a natural consequence of an agent or employee's job position, whereas, apparent authority can be inferred from the principal's conduct that tend to create an impression to the third party that the agent was authorised to perform the act for the principal (body corporate).[676]

The preceding paragraphs analysed the element of *conduct must be authored by a human being* as well as what constitute an "employee or agent" of the company. What remains to be discussed is the requirement of *in the course of employment and or furthering the employer's interests*. The paragraphs below address this requirement.

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[669] See, Dalley (2011) *U Pitt Law Rev* 547

[670] J Kultys "Controversies about agency theory as theoretical basis for corporate governance" (2016) 7(4) *Oeconomia Copernicana* 613 615.

[671] Dalley (2011) *U Pitt Law Rev* 547

[672] This is an authority that arises or can be inferred from the nature of work (position) of an agent or employee. Activities that may reasonably expected to be performed by an agent notwithstanding the absence of express term.

[673] Apparent authority may arise when the principal by conduct causes the third party to believe that the agent has authority to act on his or her behalf. The third party may rely on estoppel toward off the principal's claim that an agent had not authority to act.

[674] Dalley (2011) *U Pitt Law Rev*547; J Kultys "Controversies about agency theory as theoretical basis for corporate governance" (2016) 7(4) *Oeconomia Copernicana* 613-63.

[675] R C Wyse "A framework of analysis for the law of agency" (1979) 40(1) *Montana Law Review* 31 33.

[676] B Studniberg "Revisiting the self-authorizing agent" (2013) 44(2) *Ottawa Law Review* 311 314.

5 4 1 4 In course and scope of employment

One of the requirements that must be satisfied for human conduct to be successfully imputed onto a corporation is that at the material time when the conduct was committed (performance or omit to perform an act), the agent or servant was performing his or her designated duties. What exactly constitute *in the course and scope of employment* is contentious as is demonstrated below. Scholars describe *in the course and scope of employment* with reference to "acts of employees that are carried out in the execution or fulfilment of such employees' duties as prescribed in terms of the employment contract."[677] This description has attracted criticism on the basis that it limits liability to acts which are expressly authorised.

The implication being that acts which are incidental (implied) to the terms of the employment contract may not be covered. Further that acts which were not authorised by contract, but which can further the employer's interests may be excluded. These criticisms led to the requirement in question to be extended to cover unauthorised acts on condition that such acts were connected to the authorised acts. Salmond, in advancing this requirement, opined that:

> "a master is liable even for acts which he has not authorised, provided they are so connected with acts he has authorised that they may be regarded as modes – although improper modes – of doing them."[678]

Salmond's formulation contemplates to include incidents where the employee, (even though he/ she acted contrary to express instructions) was furthering the interests of the employer. In *Feldman (Pty) Ltd v Mall* the court found that "scope of employment" is not limited to tasks which are expressly issued and performed by the servant, this is because:

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[677] S Murray "The extent of an employer's vicarious liability when an employee act within the scope of employment" (2012) LLM Dissertation: North-West University.
[678] J W Salmond *The Law of Tort* (1969) 83

> "Instructions vary in character, some may define the work to be done by the servant, others may prescribe the manner in which it is to be accomplished, and some may indicate the end to be attained and others the means by which it is attained. Provided the servant is doing his master's work or pursuing his master's ends he is acting within the scope of his employment (…)."[679]

There are two approaches that may be applied in determining whether an employee's act can be imputed on a company under the *in the course and scope of employment* requirement, namely: the standard approach and the deviation approach. The standard approach contemplates that an employee acted as was directed or as prescribed by the employer (either expressly or implicitly). This proposition suggests that the servant ought to have been under the master's control. Further that the acts of the servant, even though they were unauthorised, if performed for the benefits of the master – then such master may be liable. Liability that is sought through the standard approach does not pose challenges when compared to the deviation approach. This is because the deviation approach attempts to hold the employer liable for employees' conduct which may, in certain circumstances, appear to be intentional or where the employee may be on a frolic of his own. On this score, Burchell argues that the criminal responsibility contemplated in section 332(1) of the South African Criminal Procedure Act, 51 of 1977 transcends the limits of vicarious liability. The reason for this averment is that the provision includes acts of the employees or agents which may fall beyond their powers and duties – with a qualifier that such acts were performed in the progression of "furthering or endeavouring to further the interests of the corporation."[680]

In *Mashudu Fhedzisani v Unitrans Ltd T/A Greyhound and Another*[681]*("Mashudu")* the plaintiff with his brother approached a bus which was idling whilst its operator who was dressed in uniform standing outside the bus. The bus operator insulted and assaulted the plaintiff. The employer's code of conduct expressly forbids the conduct exhibited by the bus

[679] *Feldman (Pty) Ltd v Mall* 1945 (AD) 733 at 741.
[680] Burchell *Criminal Law* 476.
[681] Case Number 18952/10 Decision of the Gauteng Local Division High Court delivered on 15 August 2014.

operator. A disciplinary hearing was instituted against the bus operator and he was subsequently discharged. On merit, the employer denied liability for the conduct of the employee (bus operator) on the basis that there were clear instructions that prohibited employees from misconduct.

The employer further averred that the employee was on a frolic of his own. One of the questions that the court had to address was whether the presence of a "prohibition of certain conduct was sufficient for an employer to claim that it is not vicariously liable for the actions of an employee?"[682]The court found that the driver of the bus was on duty at the time when the insult and assault occasioned. Further, that he was not on a frolic of his own. The presence of a code that prohibits certain conduct is not a decisive factor when determining an employer's vicarious liability. The court held that:

> "The bus driver, in my view, by furthering the employer's business and while dealing with passengers is very much exercising his duties when he apparently lost his temper and the incident ensued. He was objectively speaking, continuing with his duties and his employer's affairs. (…) although not authorised, the actions of the bus driver were so closely connected with the acts which he was authorised to do that they can be regarded as an improper manner of executing his duties."[683]

In deviation cases, courts tend to apply the close connection test to determine if the employee's conduct can be imputed on the employer. The connection must exist between the unlawful acts of the member of staff (personal interests) and the proprietor's business. In *K v Minister of Safety and Security*[684] the officers who were dressed in uniform offered K a lift home. She accepted the lift, and, in the process, she was raped by the three police officers. To determine the employer's vicarious liability, there were several pointers which

[682] *Mashudu* para 6.
[683] Paras 11-12.
[684] 2005 6 SA 419 (CC).

were considered that evidenced the close connectedness of the officers' acts with the police functions. This include the fact that the police officers were dressed in uniforms. The victim thus placed her trust in the police officers which trust was short lived, as it was apparent that it was subsequently abused by the police officers. In this case, the fact that the police officers had duty to protect vulnerable persons was the catalyst for them to have an opportunity to rape the victim. The court stated that:

> "The opportunity to commit crime would not have arisen but for the trust the applicant placed in them because they were policeman."[685]

The court found that the "*in the course and scope of employment"* requirement was fulfilled when the police officers acted and as a result the court imputed the unlawful conduct of the three police officers onto the employer (the government), which was vicariously liable. In modern democratic societies with justiciable bills of rights, corporations are anticipated to guard human rights and the inability to do so may attract liability. *Globler v Naspers Bpk*[686] concerned a case of sexual harassment between employees which was perpetrated on several occasions at the residence of the victim employee. The victim reported the matter to the supervisor and the supervisor, whilst seized with the report, did not reasonable procedures to prevent the continuation of the said harassment. As a result, the victim suffered an emotional breakdown. The court reasoned that liability in this case was not to be found on risk that was created by the employer; rather, liability ought to be constructed based on protected constitutional values. The employer was legally obliged to protect employees and prevent sexual harassment at the workplace.

[685] *K v Minister of Safety and Security* 2005 6 SA 419 (CC) at 57.
[686] 2004 4 SA 220 (C).

5 4 1 5 Conduct must be compliant with organisational policy

It was demonstrated above that traditionally, criminal law – at national level – recognizes that only human conduct may be imputed onto a corporate entity. This proposition appears to have been accepted, although with qualification, by the proponents of the realist approach. Of course, this qualified acceptance is premised on the assumption that corporate policies and culture wields much influence on how servants or agents will perform their duties. The influence of corporate culture or organisational policies on corporate servants or agents, as suggested by the realist approach, seems to be significant. Before unpacking the organisational policy requirement, it is worth noting that the element of *compliant with organisational policy* can be distinguished from *in the course or scope of employment* as was discussed above.

The distinction is that the former includes intentional acts and methods of operations. It contemplates to hold not only employers but also superiors and commanders derivatively liable for the unlawful conduct of agents, senior workers and subordinates respectively. The effort of the group or members of an organisation is to achieve a prescribed goal. The goal may either be lawful or unlawful. In this context the compliance with organisational policy requirement's reach extends beyond employers and may include organised groups such as rebel groups which may not qualify (in the strict sense of the definition of employment relationship) as employers. The focus in this subsection is on compliance with *unlawful* organisational policy.

To illustrate this, we can draw the attention at the SCSL decision in *Prosecutor v Charles Ghankay Taylor.*[687] As a reminder: During the late 1980s till early 2000s there were armed conflicts in Sierra Leone. The conflict was between the government and the RUF (rebel group) which had an alliance with the AFRC. Saybana Sankoh headed the rebel group, whilst Taylor being the president of neighbouring Liberia. The RUF leader assisted Charles

[687] SCSL-03-01-A, Appeal Chamber Judgment delivered on 26 September 2013.

Taylor during the armed conflict that ensued in Liberia during the late 1980s. To return the favour, Charles Tayler provided training, financial support and weapons to the RUF rebel group.

The rebel group used the support to enhance their perpetration of international crimes (war crimes and crimes against humanity). The SCSL Appeals Chamber established the link between the unlawful conduct performed by the RUF/AFRC's members and the RUF/AFRC's organisational policies and strategies to be determinative – the court stated:

> "the RUF/AFRC's operational strategy was characterized by a campaign of crimes against the Sierra Leonean population, including the crimes charged in all 11 Counts of the Indictment, which were inextricably linked to the strategy of the military operations themselves."[688]

In this matter it is apparent that the RUF/ AFRC as organised group had policies and strategies that encouraged its members to commit crimes. Thus, the unlawful conduct of the individual members of the group may be imputed on the leader of the group and on the group or organisation itself. It is important to state that it is settled law that imputing an individual member's unlawful conduct on the leader (superior/ commander) or organisation does absolve such individual member (actor) from criminal responsibility. Indeed, as we have seen, the realist approach recognizes the imputation of the conduct of an individual on an organised group or corporate entity.

The realist approach argues that the conduct of a servant or agent of an organisation or corporation should be equivalent to involuntary acts in relation to such servant but voluntary in relation to the corporation. Further, that ignorance on the part of the employees who are

[688] *Prosecutor v Charles Ghankay Taylor* at para 266, the Appeals Chamber found that "RUF/AFRC promoted sexual violence and slavery by promulgating 'Operation Pay Yourself' where the fighters were encouraged to take anything they wanted from the civilians (…)."

not or less educated may contribute to their diminished capacity of choice, including choice to resist policy directives.[689]

At the national level, the principle that comes close to the realist approach above is that of relative force. A natural person may retain, although with diminished will, "[t]he ability of subjecting his bodily movements to his will or intellect, however, he may be confronted with the prospect of suffering some harm if he chooses not to comply."[690] An example is when an employee faces the prospect of been subject to discharge in the event of non-compliance with corporate policies.[691] Equally, if the investigation reveals that the unlawful conduct in question was (a) committed outside the scope of employment; or (b) was committed contrary to corporate policies; or (c) the unlawful conduct was committed for other purposes other than furthering corporate interests – then individual criminal responsibility may be applied.

The realists' approach that a natural person's conduct must be construed involuntary to the individual and voluntary to the corporation raise distinct questions and appear not to fully appreciate the broader spectrum of corporate responsibility. There are circumstances in which corporations may be used by its owners or employees to commit crimes. It is not uncommon that employees and owners of corporations may commit crimes and use the corporate veil to shield themselves from being held responsible. Skinner cites Commerzbank, a German Bank with affiliated branches in New York, USA to be an example of a recently discovered bank that was used for money laundering by the bank's executives. Commerzbank was alleged "to have improperly facilitated business for Iran, Sudan, Cuba

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[689] See, J Clough "Bridging the theoretical gap: The search for a realist model of corporate criminal liability" (2007) 18 *Criminal Law Forum* 267-300; R Mays "Towards Corporate Fault as the basis of criminal liability of corporations" (1998) *Mountbatten Journal of Legal Studies* 31-67; W Wilkinson "Corporate criminal liability – The move towards recognizing genuine corporate fault" (2003) 5(9) *Canter Law Review* 142-170.

[690] Snyman *Criminal Law 5 ed* 55.

[691] M D Shear, M Landler, M Apuzzo & E Lichtblau "Trump Fires Acting Attorney General Who Defied Him" (30.01.2017) *The New York Times*, at <https//www.nytimes.com/2017/01/30/us/politics/trump-immigration-ban-memo.html?_r=0> (accessed on 2017/02/18). The article stated that "President Trump fired his acting attorney general on Monday night, removing her as the nation's top law enforcement officer after she defiantly refused to defend his executive order closing the nation's borders to refugees and people from predominantly Muslim countries."

and Myanmar, and abetted a multimillion-dollar securities fraud for Japanese company."[692] Scholars further cite Bank of Credit and Commerce International (BCCI) in Pakistan to be one of the banks that was suspected sponsoring terror and of the unlawful activities of Afghan rebel groups.[693] In their statement to the Committee on Foreign Relations of the USA on BCCI's affairs, (then) Senator John Kerry (who later became US Secretary of State) and Hank Brown stated that:

> "BCCI's criminality included fraud, money laundering in Europe, Africa, Asia and the Americas, bribery, support for terrorism, arms trafficking, and sale of nuclear technologies, and tax evasion."[694]

These cited situations underscore the fact that individuals (employees, agents and owners of businesses) may use their corporations as instruments (fronts) to commit crimes. This negates against the realist (narrow) approach that individual conduct ought to be construed as involuntary in respect to such individuals and voluntary in relations to corporations. In the context of ending impunity for gross human rights violations and to reconcile these two positions, it is submitted that they should not be construed in the manner that one overrides another, or to be mutually exclusive. Rather, their application ought be depending on the facts of each situation. The submission on the two approaches above effectuates the realisation of the full scale of tender of corporate charge. In contrast, to discredit any of the approaches may result in failure to cover a variety of situations – which failure may acerbate impunity for gross human rights violations.

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[692] C P Skinner "Executive liability for anti-money laundering controls" (2016) 116 *Columbia Law Review Sidebar* 1 1.

[693] S A Rizvi "The Illegal business of financial transactions" (2001) *Gulf Pakistan Economist*; M S Moodley "Money laundering and countermeasures: A comparative security analysis of selected case studies with specific reference to South Africa" (2008) *Master thesis*, University of Pretoria. Available at <http://repository.up.ac.za> (accessed on 2018/05/14).

[694] J Kerry & H Brown "The BCCI affair: A Report to the Committee on Foreign Relations United States Senate" (1992) 102d Congress 2d Session Senate Print 102-140. Available at <https://info.publicintelligence.net/The-BCCI-Affair.pdf> (accessed on 2018/05/14).

Under circumstances where a corporation is suspected to have been used by individuals to commit crimes (exceptional situations)[695] the veil of incorporation[696] may be pierced to hold the members liable. This legal innovation has been commonly practiced by various states. There are common law and statutory factors that ought to be fulfilled in order to trigger the piercing of the veil of incorporation, including where a company was established for fraudulent purposes,[697] a sham, a façade, a stratagem, a cloak,[698] or an unconscionable injustice.[699]

The nominalist and realist approaches as distinguished above, are both devices that advances social control and as such they should not be situated in a competitive spectrum, in opposition to each other, but to rather to complement each other. There are indicators that may be relevant in establishing to whether a servant or agent performed an unlawful conduct in pursuit of corporate policies or culture, which include the examination of such servant or agent's, (a) express or implied job descriptions (terms of reference); (b) the express or implied inclusion of clauses in corporate policies that encourages or promote servants or agents to commit unlawful acts, including tolerating or condoning unlawful conduct; and (c) the corporation's failure to put in place positive mechanism that discourages its servants from performing unlawful conduct.[700]

The discussion above analysed in detail the concept of corporate *actus reus* and its requirements. Arguments on whether it is feasible to supplant corporate *actus reus,* as practiced at national level, and apply it at the international level was ventilated and challenges were pointed out. The identified challenges were among the factors that

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[695] See, *Botha v Van Niekerk* 1983 (3) SA 513 (W) at 52A – "the general rule is that courts has no general discretion simply to disregard a company's separate legal personality"; *Adams v Cape Industries plc* [1991] 1 All ER 929 "the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts."

[696] Piercing corporate veil was described in *Dadoo* at 550 with reference to "disregarding a company's separate personality in order to fix liability elsewhere for what are ostensibly acts of the company."

[697] See, *Adams at* 1022.

[698] See, *Cape Pacific at* 792.

[699] See, *Botha* at 525.

[700] Strydom (2008) *TSAR* 512.

necessitated the suggestion for new rules on corporate *actus reus* at the international level. The succeeding discussion, in the section below, will focus on the principle of corporate fault (*mens rea*).

5 5 Corporate *mens rea*

It was stated in Chapters 1 and 2 of this dissertation that, in theory, the concept of corporate criminal responsibility can attach via two models. First, is the derivative (indirect) mode through which an employee or agent's conduct and *mens rea* are construed to be the conduct and *mens rea* of the body corporate. This imputation resonate from the generally common account that a juristic person is an abstract entity without hands to act and brains to think. Second is the corporate culture (direct) mode where *mens rea* of the company is deduced from the relevant corporate policies. Given these theoretical underpinnings, it follows that a body corporate's *mens rea* can be proved by the application of both the derivative and direct modes.

5 6 The concept of *mens rea*

Scholars describe the concept of *mens rea* with reference to terms such as the malevolent mind, wicked mind,[701] and guilty mind.[702] The concept focusses on a person's *state of mind* and or the thoughts of a person that existed (or assumed to) at the material time when the unlawful conduct was authored. Ahadi describes *mens rea* as "the culpable state of mind, which the prosecuting authority needs to prove, the accused had while committing an offence."[703] Robinson argues that *mens rea* may be described broadly and also in a narrower manner. In its broader description, *mens rea* is construed to be:

[701] Kemp *et el Criminal Law* 182.
[702] Burchell *Criminal Law* 54.
[703] F Ahadi "A study on the concept of mens rea elaborating on socially bound principles provided under statute law" (2017) 3(5) *International Journal of Management and Applied Science* 66 67.

> "Synonymous with a person's blameworthiness or more precisely, those conditions that make a person's violation sufficiently blameworthy to merit the condemnation of criminal conviction. (..) It includes all criminal law principles of blameworthiness, mental requirement of offence as well as excuses such as insanity, immaturity and duress, to mention a few."[704]

In contradistinction, the narrower sense of *mens rea* refers:

> "to the state of mind or inattention that, together with its accompanying conduct, criminal law defines as an offence. (…) but does not include excuses, defences or other principles outside the definition of the offence."[705]

Derived from these descriptions, it is apparent that *mens rea* may be referred to as the mental (subjective) element of a crime in contrast to physical or external elements of the crime.[706] It is a concept that finds its roots in the criminal law maxim "*actus non facit reum nisi mens sit rea.*"[707] The maxim means: the author of an unlawful act cannot be punished without a malevolent mind. The essence of this maxim is that it affords a distinction between intended and unintended unlawful acts.[708] Literally stating, the maxim contemplates to punish unlawful acts that were intended in contrast to unintended unlawful acts. This proposition is not absolute. Some scholars observed that there are unlawful acts that may attract criminal punishment without the presence of a malevolent mind – these include statutory offences which are based on strict liability.[709]

The strict liability offences fall outside the scope of *mens rea* – for this reason their intricacies is not discussed under this section. However, reference to the strict liability offences in this section, was made with specific purpose, namely, to recognise and

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[704] P Robinson "Mens Rea" (1999) *Scholarship at Penn Law*, Paper 35 available at <http://lsr.nellco.org/upenn_wps/35> (accessed on 2018/05/19).
[705] Robinson (1999) *Scholarship Penn Law* 3.
[706] F B Sayre "Mens rea" (1932) 45(6) *Harvard Law Review* 974 974; Badar (2008) *Criminal Law Forum* 473 518.
[707] Chesney (1939) *Journal of Criminal Law and Criminology* 627.
[708] Sayre (1932) *Harvard Law Review* 990.
[709] Burchell *Criminal Law* 54.

acknowledge that there is an exception to the maxim stated above. Not all unlawful acts may require *mens rea* for responsibility to attach.

5 7 Forms of *mens rea*

Mens rea is composed of two basic forms, namely intention and negligence. These two forms are discussed in detail below. However, it is important to state that negligence is neither *intention-in-disguise* nor a *lesser form of fault*, but rather an independent form of fault.[710]Thus, in this section reference to *mens rea* (fault) encapsulates intention or negligence respectively.

5 7 1 Intention

The word *dolus* even though not directly translated to mean intention is often used interchangeably with the word intention/intent. Intention means that a person performs an act willingly or deliberately, which causes the consequence.[711] Cassese defines intention as "the will to bring about a certain result."[712] Literally stating, intention can manifest in the first place in situations "where a person wants something to happen as a result of his or her conduct."[713] Cook defines intention with reference to the "attitude of mind in which the doer of an act adverts to a consequence of the act and desires it to follow."[714] Therefore, criminal intention means the accused meant to commit an unlawful conduct or deliberately caused

[710] Burchell *Criminal Law* 406 argue that "the failure to ensure that conduct does conform to the standard is reprehensible and thus negligence is regarded as a form of fault." See, contrast view by G P Fletcher "The Theory of Criminal Negligence: A Comparative Analysis," (1971) 119(3) *University of Pennsylvania Law Review* 401 402 in particular where he argues that "[n]egligence appears indeed to be an inferior, almost aberrant ground for criminal liability. Every interest protected by the criminal law is protected against intentional violations; but only a few – life, bodily integrity, and sometimes property – are secured against negligent risks."
[711] Snyman *Criminal Law* 182 defines intention "the will to commit the act or cause the result set out in the definitional elements of the crime, in the knowledge of the circumstances rendering such act or result unlawful."
[712] A Cassese *International Criminal Law* (2003) 162.
[713] S Parsons "Intention in criminal law: Why is it so difficult to find?" (2000) *Mountbatten Journal of Legal Studies* 5-6.
[714] W H Cook "Act, Intention and Motive in the Criminal Law" (1917) 26(8) *Yale Law Journal* 645-663 at 654.

the proscribed consequences. From the Rome Statute's perspective, intention is defined as follows:

> "For the purposes of this article, a person has intent where: (a) in relation to conduct, that person means to engage in the conduct; (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in ordinary course of events."[715]

Derived from these definitions, it is apparent that intention may be limited to situations where the actor achieved what he or she desired through his or her acts. However, there is a plethora of legal literature which suggests that intention is not just limited to the desired outcomes or consequences as defined above – rather, it extend and include, as Burchell puts it, "not just to deliberate but also foreseen conduct."[716] In this context, intention appears to cover a wide range of situations. A note here is required: intention can be contrasted with motive. Motive underscores the purpose or reason of doing something.[717]

At domestic level, there are several forms of intention, notably, "*dolus directus", "dolus indirectus", "dolus eventualis", and "dolus indeterminatus*." In contrast, from the international criminal law perspective, precisely from the Rome Statute – it recognizes two forms of intention, namely direct and indirect intention. On this score, Van der Vyver argues is of the opinion that the definition of intention provided for in the Rome Statute recognise "*dolus directus"* and "*dolus indirectus"* to the exclusion of "*dolus eventualis."* The exclusion of *dolus eventualis* is assumed "by the provision requiring intent and knowledge."[718]These forms of intention are analysed in the framework of corporate criminal scheme below.

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[715] Art 30(2) of the Rome Statute of the ICC.

[716] Burchell *Criminal Law* 360.

[717] Kemp *et el Criminal Law* 184 explains that "motive means the underlying reason for the accused's unlawful conduct. (…) the motive with which a particular accused acted may affect his moral blameworthiness and may thus act as mitigating or aggravating factor in relation to sentencing."

[718] J D Van der Vyver "The International Criminal Court and the concept of *mens rea* in International Criminal Law" (2004) 12 *U of Miami Inter' Law and Comparative Law Rev* 57

5 7 1 1 Dolus directus

Dolus directus literally means direct intention. It entails that an accused person meant to commit a proscribed conduct or deliberately caused the proscribed outcome and or consequence. Burchell argues that "this type of intention will be present where the accused's aim and object was to perpetrate the unlawful conduct or cause the consequence."[719] In the context of corporate responsibility, corporate direct intention means that the corporation's aim and object were to deliberately cause the consequence. There are several ways through which corporate direct intention may manifest, for instance where there is a corporate policy that encourages the commission of certain conduct; and where the employees of the corporation, in the course of their employment, deliberately cause the proscribed consequences.

Among the instructive cases on corporate direct intention is the *Institute for Human Rights and Development in Africa and Others v Democratic Republic of Congo*[720]*("Institute for Human Rights").* This case was analyzed in chapter 4 above. However, for purposes of the discussion on corporate direct intention, it is important to restate the salient facts. Anvil Mining Limited operated a mine field Dikulushi area, DRC. 2004 marked the heat-year for the subsisting internal armed conflict in the DRC between the rebel groups and government forces in Kilwa area, about 50 kilometres from Dikulushi. Because of the proximity of Kilwa to Dikulushi, Anvil Mining Limited thought its interests were threatened by the conflict. Anvil Mining Limited's wanted to protect its interests and as result provided the Congolese military with vehicles, chartering planes, and financing for military operations to enable the military to effectively dismantle the rebellion.[721]

[719] Burchell *Criminal Law* 362.
[720] Communication 393/10 decision adopted during the 20th Extraordinary Session of the African Commission on Human and People's Rights held from 9-18 June 2016, Banjul, The Gambia.
[721] McBeth (2014) *Yale Human Rights and Deve' Journal* 131.

It was alleged that Anvil Mining Limited participated in committing atrocities, and that employees of Anvil Mining Limited were deployed, armed with weapons and directly participated at the battlefields together with the Congolese military officers. Conduct included torture and extrajudicial killings of the rebels. When the matter was brought before the African Commission. The Commission found the DRC to be accountable for atrocities committed.[722] This decision went further to require DRC to prosecute and punish the employees of Anvil mining company for their deliberate commission of atrocities. It appears from this case that Anvil Mining Limited's motive was to protect its interests. Beyond motive, because the company willingly deployed its armed employees at the battlefield with the knowledge and intended plan to protect its interests at all costs, one can also construct a case of corporate direct intention.

5 7 1 2 Dolus indirectus

Burchell posits that indirect intention "exists where, although the unlawful conduct or consequence was not the accused's aim and object, he or she foresaw the unlawful conduct or consequence as certain."[723] Let's take a hypothetical example: Corporation Y is a registered company with its main office in Namibia and its business interest is primarily the extraction of oil. It obtains a lucrative extractive concession from the Namibian government to extract oil from the Erongo region. The said Erongo region is inhabited by the native population who survive on crop farming. The population are requested to move from their homes and farms to clear the land for construction of the extraction plant.

The population refuse to move out of their villages and farms. The refusal prompts corporation Y to request government forces to assist in forceful removal of the native population. To effectuate the forced removal, corporation Y provide the government forces with essential services such as the provision of accommodation, transport as well as funding

[722] *Institute for Human Rights* paras *5-7*.
[723] Burchell *Criminal Law* 363.

for operations conducted within the earmarked concession area. Amidst these operations, government forces commit rapes, murder, forced removal and damage to properties.

It could be inferred that corporation Y's aim and objective was to lawfully extract oil – as per the concession awarded to it. However, in order to achieve this, it is necessary to clear the land in order to construct the extraction plant. By necessity, the clearing of the land required the native population to be moved from the oil concession area. Because of the civilian population's resistance to move, corporation Y went ahead and requested government forces to intervene.

The forced removal and atrocities committed by the government forces were not corporation Y's aim and object – however, corporation Y could not achieve its object without first clearing and constructing the oil plant. If corporation Y is charged for the atrocities committed, it cannot claim that it only intended to extract oil and not to cause forced removal or atrocities suffered by the native population. The volition is satisfied in the sense that corporation Y directed its will at the extraction of oil, with full knowledge that the native population would be forcefully removed from their villages and farms to make way for the construction of the oil plant which was necessary in achieving corporation Y's ultimate goal.

5 7 1 3 Dolus eventualis

Burchell states that this form of intention "exists where the accused foresaw the possibility that the prohibited consequence might occur and the accused accept this possibility into the bargain."[724] Cassese used the concept of *dolus eventualis* interchangeably with *recklessness* and defined them with reference to the "state of mind where a person foresees that his/ her action is likely to produce a prohibited consequence, and nevertheless takes the risk of so acting."[725] Under this form of intention, the accused must have foreseen that his/her act may possibly bring about a proscribed result or

[724] Burchell *Criminal Law* 55.
[725] Cassese *International Criminal Law* 168.

consequence (secondary) other than the results which the accused primarily desired – with this foresight the accused went on and acted.

One could look at the hypothetical example of Company Y in Namibia (above) and construct a possible case of *dolus eventualis* on the same set of facts, if one would argue that Company Y had knowledge of the risk of government security forces' overreach and nevertheless persisted with its decision to involve the security forces. Viewed through the prism of *dolus eventualis* one can then argue that Company Y was aware of a risk, and recklessly pursued the course of action regardless of the risk. One should just be careful not to frame Corporation Y's *mens rea* in "ought to have done" terms – i.e. the test for negligence. If, on the scenario that Company Y was aware of the risk of government forces' propensity for overreach or worse, one would proceed to say that Corporation Y "ought to have cancelled the involvement of government forces, but nevertheless persisted", the framing is no longer one of *dolus eventualis*, but rather that of negligence. This fine line, between the tests for negligence and *dolus eventualis* or recklessness can cause problems if the facts are murky, or if there is a prosecutorial or judicial misapprehension of the test for negligence (objective) as opposed to *dolus eventualis* or recklessness (subjective). To solve this doctrinal problem some jurisdictions have created a category between negligence and intent, known as "conscious negligence" or *luxuria*. This is where a person foresaw a particular result, but unreasonably came to the conclusion that it would not materialise. A note here is needed – to explain that *luxuria* is forms part of negligence but not for intention.[726]

At the standpoint of international criminal law, one should note that there is a debate between scholars as to whether *dolus eventualis* or recklessness would be enough to satisfy

[726] P Carstens "Revisiting the relationship between *dolus eventualis* and *luxuria* in context of vehicular collisions causing the death of fellow passengers and/or pedestrians: S v Humphreys 2013 (2) SACR 1 (SCA)" (2013) *South African Journal of Criminal Justice* 67 68; See, also, W Bertelsmann "What happened to *luxuria*? Some observations on criminal negligence, recklessness and *dolus eventualis*" (1975) *South African Law Journal* 59 74.

the *mens rea* element of criminal liability for atrocity crimes. There seems to be a general proposition that customary international law may apply *mens rea* in the form of *dolus eventualis*. Here an argument could be made for the inclusion of *dolus eventualis* or recklessness for atrocity crimes. This is probably correct, no doubt because of the widespread recognition of *dolus eventualis* as an acceptable species of intent in national legal schemes,[727] and because of the principles of criminal liability as set out by the Nuremberg IMT.[728] Considering the Rome Statute, however, the issue appears to be more contentious. Commentators have pointed out that Article 30 of the Rome Statute is "considerably stricter than the one generally required in customary international law and domestic legal orders."[729]

The reason here, is because intention and knowledge in relation to the result of the specified conduct are required. This leaves no room for liability based on reckless behaviour or based on *dolus eventualis*. The only scope for *dolus eventualis* or recklessness as an acceptable form of *mens rea* under the Rome Statute would be to find it in the "otherwise provided" provision in article 30 (1) of the Rome Statute. The language of the rest of Article 30 of the Rome Statute also seems to exclude *dolus eventualis*/ recklessness as generally acceptable forms of *mens rea* for purposes of the atrocity crimes. Indeed, Articles 30(2)(b) and (3) suggests that the alleged perpetrator must not be more than just aware of the risk or "[p]ossibility that his or her conduct would cause the consequence in question."[730] The language, "will occur", as opposed to, "may occur", supports this interpretation.[731]

Although some of the earlier decisions by the ICC seem to have supported a broader view of *dolus* under Article 30, to include *dolus eventualis*,[732] later decisions have rejected

[727] See, for instance, F Mantovani "The general principles of international criminal law: The viewpoint of a national criminal lawyer" (2013) *Journal of International Criminal Justice* 26 32.
[728] HH Jescheck "The general principles of international criminal law set out in Nuremberg, as mirrored in the ICC Statute" (2004) *Journal of International Criminal Justice* 38 45.
[729] Werle & Jessberger *International Criminal Law* 191.
[730] Art 30(2)(b) of Rome Statute.
[731] Werle & Jessberger 180.
[732] *Thomas Lubanga* at paras 349-352.

such a broad reading and opted for a more restrictive reading, in line with the plain language of Article 30.[733]

Although I am sympathetic to the broader understanding of *dolus* (to include dolus eventulais/recklessness), especially in the context of corporate criminal charge and given the risks created by corporate behaviour, such a broader reading would stretch the meaning of *dolus* under Article 30 of the Rome Statute beyond the plain meaning of the text. For *dolus eventualis*/recklessness to be included as forms of *mens rea*, Article 30 will have to be amended, or will have to be textually linked to a suitable "otherwise provided" provision, specifically related to criminal responsibility of corporations. This will have to be the subject of law reform and an amended Rome Statute. More on this in Chapter 7, below.

5 7 2 Negligence (and the inapplicability to atrocity crimes)

Scholars define negligence with reference to "omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."[734] Negligence (*culpa*) arises when there is failure to measure up to certain standards on the part of the accused. Cassese argue that a person act negligently, if such person "acts in disregard of certain elementary standards with which any reasonable man should comply and in addition, such a person is aware of the risk of harm but takes it believing that the risk will not materialise owing to the steps he has taken or will take."[735] It follows that the test to determine negligence is objective – that is, the reasonable person's test. A reasonable person is defined as "a hypothetical person within a society who exercises average care,

[733] *Prosecutor v Jean-Pierre Bemba Gombo*, (Confirmation of charges) decision of 15 June 2009, paras 357.
[734] J G Tinus "Reasonable person in criminal law" (2017) LLM Thesis Queen's University (Canada), 1 at <https://qspace.library.queensu.ca> (accessed on 2018/05/19); H Kristin "Applying the reasonable person standard to psychosis: How tort law unfairly burdens adults with mental illness" (2007) 68(6*) Ohio State Law Journal* 1733 1738 defines negligence as "not exercising reasonable care under all the circumstances."
[735] Cassese *International Criminal Law* 171.

skill, and judgment in conduct and who serves as a comparative standard for determining liability."[736]

Since the focus of this dissertation is the atrocity offences of "*genocide, crimes against humanity and war crimes*", *mens rea* in the form of negligence is not relevant. These most grave offences at international law all involve *mens rea* in the form of intent. Indeed, for the crime of genocide, a specific form of intent is required, namely: special intent (*dolus specialis*).[737] As for corporate criminal accountability, the required *mens rea* for the atrocity crimes should also be in the form of intent. This is also reflected in the proposed amendments to the Rome Statute in Chapter 7, below.

5 8 Nominalist vs. realist approaches to corporate *mens rea*

At corporate *mens rea*, the nominalist (derivative) approach posits that a body corporate may be charged criminally. However, the criminal responsibility of a juristic person must be predicated by a guilty finding against the servant or agent (natural persons) of such a juristic person. The servant of a company who performed the unlawful conduct should first be found criminally responsible, thereafter; such guilty finding may be imputed on the corporation. [738] The assumption is that a natural person who is an employee, servant of the corporation is considered to embody such corporation's will and mind. Therefore, the established fault on the part of the servant or agent is construed to be the fault of the corporation.[739]

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[736] J G Tinus "Reasonable person in criminal law" (2017) LLM Thesis Queen's University 1.

[737] D Aydin "The interpretation of genocidal intent under the Genocide Convention and the jurisprudence of international courts" (2014) *The Journal of Criminal Law* 423 425.

[738] Foreign Corrupt Practices Act (FCPA) 1977 -FCPA Amendment Act 1988 (known as Trade Act 1988), and FCPA Amendment Act 1998, section 78dd-1 &2 altered the focus to include the prohibition of corporate corruption within and beyond the borders of the United States; Sarbanes-Oxley Act of 2002, section 301; Council of Europe Criminal Law Convention 173 of 1999 article 3 "liability of a legal person (…) shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offences (…)."

[739] Kyriakakis (2009) *Netherlands International Law Review* 337; See, Zinnecker (1985) *Brigham Young University Law Review*, 317 320 – who refers to the judgment in *Goddard v Grand Trunk Ry*., 57 Me. 202, 223 (1869), in which the court held that "a corporation is an imaginary being. It has no mind but mind of its servants (…) All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands."

In contrast, the proponents of the realist approach argue that the derivative model deliberately turns a blind eye to the reality that corporations can pursue their own desires. In that, nominalists predicate a guilty finding of a natural person, only then can such guilty finding be imputed on corporation. This is challenged by realists, who assume that the organisational culture when analysed correctly, may demonstrate that corporations' *mens rea* may be independent of a natural person's will and mind. French contends that the desire of the corporation can be distinguished from those of its servants or agents, if it can be demonstrated that "corporations and not just the people who work in them have reasons for doing what they do."[740] In order for a corporation to effectively conduct its business, it may, among others, be required to formulate policies, set goals, develop corporate structures and hierarchy and put in place processes for decision making. Thus, the actuality of these characteristics coupled with the reasons for corporations to conduct business lies at the heart of French's argument as to why a body corporate's fault must be gathered from its culture and policies.

Without losing sight of French's contention above – a note here is necessary: when a company is registered (time of incorporation), it is often required that a corporation must state its nature of business.[741] The reason for this requirement is to ensure that the object of the corporation is not unlawful in nature. By virtue of this requirement, at first glance, it may be inferred that corporations are created for reasons related to lawful business endeavours – and there is reason for them to carry out such businesses. It is argued that the fact that a corporation was created for lawful business, does not exclude the possibility of such a corporation to develop further policies or adopt a new corporate culture that may tend to encourage or tolerate the commission of crimes in the future whilst pursuing its business interest. To buttress this argument, the discussion that follows, attempts to identify

[740] P A French "The Corporation as a moral person," (1979) 16(3) *American Philosophical Quarterly* 207 213.
[741] Namibian Companies Act 28 of 2004, section 59(1).

how a corporation, even though it was registered to conduct lawful business, may use its corporate culture and policies to tolerate or encourage the commission of crimes.

5 8 1 Corporate culture: what is it?

The realist approach advocates for corporate *mens rea* that is constructed from corporate culture. The corporate culture model as Cavanagh posits, attempts to hold "[c]orporations directly liable for their own acts and omissions,"[742] and he describes corporate culture as:

> "[A] doctrine that examines body corporates' organizational processes, structure, goals and hierarchies. This doctrine combines these variables to determine whether there is culture that sanctions or encourages the commission of crime. If it can be shown that a corporate culture of non-compliance with the law existed, it becomes possible to infer corporate *mens rea* by the corporation itself."[743]

In this context, corporate culture entails how the corporation conduct its affairs, how it executes its functions and decision-making processes.[744] The characteristics of corporate culture embody the corporation's values, mission, assumptions and artefacts. Corporate culture thus reflects how the corporation expresses or represents itself to the public at large. Most often, the object of corporate culture is to positively impress the public (consumers) and those associated with such a corporation. Shimasaki argue that "every company is unique in its culture and the manner in which it conducts its business."[745] It follows that corporate culture reflects the personality of a body corporate. These personality traits are "tangible to an extent that outsiders and customers can sense a real difference"[746] and be able to distinguish between body corporates, just like distinguishing between individual

[742] Cavanagh (2011) *Journal of Criminal Law* 429.
[743] Cavanagh (2011) *Journal of Criminal Law* 432.
[744] J J Dahlgaard & S M Dahlgraad-Park "Lean production, six sigma quality, TQM and company culture", (2006) *18(3) The TQM Magazine* 263 273.
[745] C Shimasaki *Biotechnology Entrepreneurship: Starting, Managing and Leading Biotech Companies* (2014) 394.
[746] Shimasaki *Biotechnology Entrepreneurship* 395.

natural persons. Therefore, corporate culture identifies a body corporate to an extent that in the eyes of the society, as Shimasaki puts it, "[o]ne can say that each company has a personality of its own."[747]

The effect of corporate culture on the corporation, servants or agents cannot be overstated. Li *et al*[748] conducted a study on how corporate culture can influence a corporate decision. The study revealed that corporate culture has strong influence on how the corporation functions and further that it may induce or encourage or "influence corporate risk-taking both through its effects on managerial decision-making and even through its effect on a country's formal institutions."[749] The study conducted by Li *et al* further established that when a body corporate's corporate culture is strong and effective it renders the concept of individualism weaker and ineffective. In this manner, corporate culture prescribes or commands collectivism – which renders it difficult to distinguish an individual's fault – that is, an individual's *mens rea* is rendered insignificant because it is usurped by the collective will and intellect (corporate *mens rea*).

Corporate culture as was demonstrated above, have the effect of not only to influence the corporation to take the non-risky decisions but that it may pose a negative effect on corporate decision by increasing the "[f]irm's appetite for risk and consequently the perilousness of their decisions."[750] It is on these theoretical bases, among others, that the proponents of the realist approach advocates for corporate *mens rea* that is construed from corporate culture. This is because under these circumstances the nominalist (derivative) model fails to reflect these stated realities of corporate culture.

The practice of construing corporate *mens rea* that is based on corporate culture is relatively new in the sphere of national criminal law. However, countries such as Australia

[747] Shimasaki *Biotechnology Entrepreneurship* 394.
[748] Li *et al* (2013) *Journal of Corporate Finance* 22
[749] Li *et al* (2013) *Journal of Corporate Finance* 19.
[750] Li *et al* (2013) *Journal of Corporate Finance* 9.

has put in place legislation that hold corporations criminally responsible for crimes committed based on corporate *mens rea*. In this regard, the instructive instrument is the Australian Criminal Code.[751] The code provides for corporate criminal responsibility in its strict sense and it contemplates to construe corporate *mens rea* derived from corporate culture.[752] Corporate *mens rea* based on corporate culture may be attributed to a body corporate where it is established that such a corporation "expressly, tacitly or impliedly authorized or permitted the commission of the crime."[753]

In the Australian Criminal Code, the concept of "corporate culture" is defined to mean "attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place."[754] It follows that, to determine if a body corporate authorized a certain conduct – unlawful conduct in particular – regard given to the Australian Criminal Code. The code lays down two criteria. Firstly, it requires proving that within the body corporate there existed a corporate culture at the material time when the unlawful conduct was performed. The existence of corporate culture alone is not enough for purposes of attributing *mens rea* – rather the existence thereof must have "directed, encouraged, tolerated or led to non-compliance"[755] with the law. Secondly, it is incumbent on the prosecution to demonstrate that, at the time when the unlawful conduct was committed, the corporation "failed to create and maintain a corporate culture that required compliance"[756] with the law.[757] The concept of corporate culture can be distinguished from corporate policy for purposes of corporate responsibility. The discussion below analyses the concept of corporate policy.

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[751] Act 12 of 1995 as amended by the Amendment Act 55 of 2001.
[752] Clause 12.3(1) provides that "if intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorized or permitted the commission of the offence."
[753] Clause 12.3(1).
[754] Clause 12.3 (6) para 2.
[755] Clause 12.3(2)(c).
[756] Clause 12.3(2)(d).
[757] Clause 12.3 (6) para 2.

5 8 2 Corporate policy: what is it?

For present purposes a *policy* refers to a set of ideas or a plan or course of action that is proposed or adopted by an institution – corporations are not an exception. A corporate policy is a subcomponent of corporate culture – that is, because a culture includes a policy.[758] A corporate policy reflects the aspirations, ideas or course of action that is adopted or implemented by a corporation. In a nutshell, policies or strategies dictate in a systematic manner as to what should be done, and it provides the object for performing such action. A good policy can be an effective tool for a corporation's success; however, a bad policy can negatively impact a corporation – including paving way for a corporation to commit crimes.

To establish *mens rea* of an individual person based on an entity's policies is criticized by the realist approach on the basis that it is prejudicial to an individual. For instance, it dispenses with the principle of cost-benefit of punishment. When a servant or agent of a juristic person commits an unlawful act whilst on duty and in furtherance of such juristic person's interest – there may be no benefits that accrue to such agent or servant. Rather, at that material time, the benefits may accrue to the corporation. In addition, the unlawful conduct committed by the servant or agent of a body corporate while pursuant to corporate policies are devoid of such servant or agent's independent volition. Therefore, the prejudice here lies in subjecting an individual to punishment for unlawful conduct from which he or she did not derive pleasure or benefit and from the absence of such agent or servant's volition to commit the unlawful conduct.

In sum, the discussion above described the concept of corporate culture and that of corporate policy and demonstrated how corporations may use its corporate culture and policies to encourage or tolerate the commission of crimes. The discussion that follows,

[758] See, Clause 12.3(6) para 2 definition of culture.

attempts to identify and suggest new rules that may be applied in construing corporate *mens rea*.

5 9 The new method of attributing *mens rea* to a corporation

In the sections above, it was identified that *mens rea* refers to the guilty mind. A guilty mind may be manifested in different ways. The orthodox criminal law recognizes two forms of *mens rea*, namely: intention, and negligence. This was stated in the discussed above. These forms of *mens rea* are recognized at domestic level and may be applied to establish individual and corporate criminal responsibility as was demonstrated in Chapter 2. As we know, the concept of corporate criminal responsibility is not currently applied at international criminal law level, and ICC.is not an exception. This dissertation proposes that corporate criminal responsibility should be recognized as a mode of responsibility for atrocity crimes. A key requisite will be to recognise and construct the element of corporate intention for the commission of atrocity crimes.

Corporate intention can manifest in different ways. *Firstly*, in situations where a natural person who is an employee of the corporation with guilty mind, whilst in course or scope of his/her employment, meant to commit an unlawful conduct or deliberately brought about a proscribed consequence (*dolus directus*). *Secondly*, in situations where a natural person who is an employee or agent of the corporation, “in the course or scope of his/her employment”, does not deliberately cause the prohibited consequences – however, such employee or agent realises that to accomplish the corporation’s goal, by necessity the prohibited conduct or consequence may occur (*dolus indirectus*).

Thirdly, the situation where an operative of a company, whilst “*in the course or scope of his/her employment*”, have foreseen that his/her act may possibly bring about a proscribed result or consequence, other than the results which the accused employee or agent primarily desired. With this foresight, the accused employee or agent went on and acted. It is required

under this situation, that (a), the offending corporation foresaw that there existed a possibility that unintended consequences (proscribed acts) might be committed by its operative, and (b) the company, despite the foresight of the secondary consequences went on and took the risk (*dolus eventualis*). *Finally*, apart from the three situations above, corporate intention may exist in situations where there is a corporate policy or strategy that condones or encourages the employees or agents to deliberately cause the prohibited conduct or consequence.

In light of these situations above, through which corporate intention may be construed, to successfully prosecute an offending corporation, the prosecution is required to show that at the material time when the unlawful conduct was committed the offender (i) *had knowledge of the act*, (ii) knowledge of the elements of the crime, (iii) the unlawfulness of such conduct, and (iv) directed his/her (its) will towards the commission of the unlawful conduct.[759] Intention (*dolus*) be it for co-perpetrator or accomplice[760] and actors in terms of JCE, therefore consists in various forms, namely direct, indirect, *dolus eventualis/*recklessness, and *dolus generalis* (*indeterminatus*).

The *Social and Economic Rights* case referenced in chapter 4 may be instructive regarding corporate intention to commit atrocities. In this case the organisation's operational policy called for "ruthless military actions against demonstrators"[761] with specific intent to displace the indigenous people from their villages.

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[759] Snyman *Criminal Law* 182 define intention "as the will to commit the act or cause the results set out in the definitional elements of the crime, in the knowledge of the circumstances rendering such act or result unlawful."; *Prosecutor v Du [Ko Tadi]* para 657 citing with approval the decision in *R v Finta* [1994] 1 RCS 701 in which the court found that "the mental element required to be proven to constitute a crime against humanity is that the accused was aware of or willfully blind to facts or circumstances which would bring his or acts within crimes against humanity. However, it would not be necessary to establish that the accused knew that his action were inhumane."

[760] *Juvenal Kajelijeli* at para 768 it was found that "for purposes of accomplice liability, the *mens rea* requirement will be fulfilled where an individual acts with the knowledge that his or her acts assists in the commission of the crime by the actual perpetrator. The accused need not to know the precise offence being committed by the actual perpetrator, the accused must be aware of the essential elements of the crime, and must be seen to have acted with awareness that he or she thereby supported the commission of the crime."

[761] *Social and Economic Rights* at para 8.

5 10 A note on the relationship between corporate intention and knowledge

Knowledge refers to awareness of something; the cognitive element. In criminal law, knowledge refers to "[t]he offender's awareness of the unlawful conduct, existence of circumstance or consequences."[762] It can either be actual or constructive knowledge. Knowledge is not a form of intention. It can, depending on the law, be required as an element of *mens rea*. Knowledge encompasses both the knowledge of the circumstance and that of the consequence. This may be established if it is proven that the accused corporation is "[a]ware that a certain circumstance or consequence exists or will exist in the ordinary course of events."[763] This requirement is both reactive and proactive in terms of combating corporate criminality. It encourages corporations to observe the due diligence duty – which in turn helps in the foresight in relation to the likelihood of a consequence or circumstance to occur. In this manner the corporation stands in a good position to reprimand or punish its agent or servant who may commit atrocities contrary to corporate policies.

As demonstrated in chapter 4 above, a corporation has the responsibility to avert the commission of unlawful conduct (atrocities) by its agents or servants. This corporate duty may arise when the corporation is seized with the knowledge or has belief to suspect that an unlawful conduct is commensurate or is approximately to be committed. Under these circumstances, it is incumbent on the corporation to "take reasonable measures" to punish or refer the breach to a competent body for investigation or to have the servant or agent punished accordingly.[764]

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[762] Badar (2008) *Criminal Law Forum* 495.

[763] Art 30(3) Rome Statute of the ICC defines knowledge as "awareness that a circumstance exists or a consequence will occur in the ordinary course of event."

[764] See, A Eser & F Retttenmaier "Criminality of organisations: lessons from domestic law – a comparative perspective" in A Nollkaemper & H Van de Wilt (eds) *System criminality in international law* (2009) 222 233.

The concept "knowledge" may be divided into actual[765] and constructive knowledge.[766] Bantekas[767] argues that the standard which is based on 'the reason to *know test*'[768] as was applied in ICTR[769] and ICTY[770] is higher than *knew test*. In effect these tests "mean that a person who is in possession of sufficient information about criminality may not escape liability by ignorance."[771] If this standard were to be applied on the Talisman Energy Inc[772] case, that company would not have escaped responsibility for the atrocities that were committed in Sudan. As was mentioned in Chapter 4, there was clear evidence which showed that senior representatives of Talisman Energy Inc knew about the oppressive rule which the military exerted on the people who lived in the oil rich regions. Despite this awareness Talisman Energy Inc continued to hire the military as its security agency. It financed the military operations and upgraded roads and airstrips which made it easier for the military to continue with the commission of atrocities. Indicators that may be applied to establish corporate knowledge, among others, include: the type and nature of atrocities committed, the frequencies of occurrence of crimes – for instance widespread or systematic, repetition thereof, locality of the crime, and the logistical support deployed.

Article 30 of the Rome Statute provides that for criminal responsibility, a person must commit the unlawful conduct with intent *and* knowledge. Both mental elements are thus required; not the one or the other.[773] Currently, of course, this standard applies to natural

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[765] *Prosecutor v Sefer Halilovic* IT-01-48-T, Judgment delivered on 16 November 2005, para 65 the Tribunal held that "the knowledge cannot be presumed but must be established based on the circumstantial evidence."
[766] Art 28(a)(i) Rome Statute of the ICC state that "the person either knew or owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes."
[767] Bantekas (1999) *AJIL* 595.
[768] Badar (2008) *CrimLF* 473 512.
[769] Art 6(3) Statute of the ICTR.
[770] Art 7(3) Statute of the ICTY.
[771] Bantekas (1999) *AJIL* 590; *Prosecutor v Blagoje Simić* IT-95-9-A, Judgment delivered on 28 November 2006 at para 135 the tribunal in determining the guilty of the accused who pleaded ignorance held that "the accused must have known of the mistreatment of the non-Serb detainees, including the confinement under inhumane condition because Bosanski Samic is a small town – the moans and cries of prisoners could be heard outside the detention centre."
[772] *Talisman Energy* para 7.
[773] Art 30(1) Rome Statute of the ICC. See, also, Werle & Jessberger *International Criminal Law* 179.

persons only. Suggestions as to whether the interpretation of Article 30 – on the mental element – should be retained for the proposed ICC jurisdiction over corporate entities accused of atrocity crimes will be addressed in Chapter 7.

5 11 Conclusion

This chapter analysed the competing approaches and theories on unlawful conduct and fault in the context of corporate criminal responsibility. These approaches were identified as nominalist (derivative) and realist. It was also identified that the notion of corporate *mens rea* is implicitly excluded from the text of the Rome Statute. In contrast, the Rome Statute recognizes the concept of individual *mens rea*[774] of persons who are eighteen (18) years old and above.[775] This exclusion entrenches the values and assumptions associated with the nominalist approach – including that a body corporate cannot form the actual or constructive malevolent mind of its own. The consequence of this exclusion was identified to have exacerbated, among others, the disjoint between national and international criminal law.

With the object of reducing the identified disjoint as well as "putting an end to impunity" for corporations which are responsible for the commission of atrocities, this chapter proposed new rules for corporate unlawful conduct and fault. These new rules were analysed in details and explanations were presented stating the contours of the proposed requirements. The centrality of the chapter was to showcase the appropriate model that may best be applied in the quest of holding corporations criminally responsible for atrocities. In this manner this chapter, in particular on fault, it departed from the orthodox approach which was restricted to predicating a guilty find of a servant or agent prior to attributing such finding on the corporation – and proposed a combination of factor rule. In this vein, it was

[774] Art 30 of the Rome Statute of the ICC.

[775] Art 26 of the Rome Statute of the ICC, provides that "the court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime."

demonstrated that corporate culture is much responsive and it captures the modern complex nature of corporate activities than construing fault based on derivative models.

Further it was demonstrated that the physical and mental element requirement may be established or deduced from a myriad of factors. These factors include but not limited to the methods used, the number of victims involved and their status.[776]In essence, in the jurisprudence of the ICC it is clear that to establish *mens rea* of an individual, depending on the nature of crime, requires proving that such individual acted with intention to commit the unlawful conduct and further that he or she had necessary knowledge or was aware that the conduct was unlawful.[777]

The succeeding chapter, unlike the present chapter, analyses the concept of corporate punishment. It juxtaposes on the available forms of corporate punishment, the rational of punishment and explores several options that may be adopted – which may be best suited for corporate punishment. Corporate punishment, as is discussed in the said succeeding chapter, encompasses punishment imposed on the servant or agent of the corporation as well as that which is imposed on the corporation itself.

[776] *Prosecutor v Juvenal Kajelijeli* ICTR-98-44A-T, Judgment delivered on 01 December 2003, para 806 the Trial Chamber II held that "some indicia of intent may be evidence such as the physical targeting of the group or their property, the use of derogatory language towards members of the targeted groups, the weapons employed and the extent of body injuries, methodical way of planning and the systematic way of killing."; *Katanga* at para 807.

[777] *Prosecutor v Paul Bisengimana* ICTR-00-60-T, Judgement delivered on 13 April 2006, para 57 the Trial Chamber held that "accused must have acted with knowledge of the broader context of the attack and knowledge that his act formed part of the attack on the civilian population."; Badar (2008) *CrimLF* 475.

Chapter 6

Punishment: exploring how corporations may be criminally sanctioned for atrocity crimes: An amended jurisdiction of the international criminal court

6 1 Introduction

Chapter 4 showcased that corporations are capable of participating in the commission of atrocities, and in chapter 5 it was shown how unlawful conduct may be imputed on the corporation as well as how corporate fault may be construed. This chapter underscores that subjecting corporations to criminal sanctions for crimes under international criminal law (atrocity crimes) should be pursued as a necessary imperative. In this context, this chapter focuses on the form of sanctions that may be imposed on the offending company. In so doing, the chapter firstly elucidates the concept and purpose of punishment.

Secondly, the chapter provides an analysis on reasons that contemplate to justify corporate punishment. Thirdly, the chapter analyses the theories such as absolute, relative and combined theories. These theories are analysed in the light of the sanctions that may be imposed on body corporates. Finally, the Chapter analyses the nature of punishment that may be appropriate for corporations, including imprisonment (for corporate employees/servants); criminal fines; suspension of corporate trade licence; deregistration and declaring corporations as criminal organisations; and adverse publication.

6 2 Concept of punishment

The concept of punishment is generally defined with reference to any measure that may be deemed to be painful or that renders some form of discomfort on the person been punished.[778] Terblanche defines punishment with reference to:

> "the experience of unpleasantness or the deprivation of goods or an adverse sanction which leaves the offender in a position less advantageous than that in which he found himself before the imposition of the punishment."[779]

In *Ex parte Minister of Justice: in re R v Berger* the court established that punishment includes "everything that adversely affects the accused in his person, his occupation or his property as part and parcel of the punishment inflicted upon him."[780] The Merriam-Webster Dictionary defines punishment as "a penalty inflicted on an offender through a judicial process."[781] This involves, among others, imprisonment, forfeiture of properties, death, payment of fine, suspension of licence (trade and/or driver's) and compensation.

Garland describes punishment as "the legal process whereby violators of criminal law are condemned and sanctioned in accordance with specified legal categories and procedure."[782] Bean argues that: in criminal law – punishment consists of certain characteristics and identifies same, among others, as follows:

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[778] M Dan-Cohen "Sanctioning corporations" (2010) 19 *Journal of Law and Policy* 15 at 18 describes criminal punishment as "a form of centralized social control that employs coercion, is initiated by the state, is rule-bound, and is judicially administered."; L A Lefton *Psychology* (1991) defines punishment as "a process of presenting a consequence, delivered after a behavior, which serves to reduce the frequency or intensity with which the behavior occurs."

[779] S S Terblanche *Guide to sentencing in South Africa 2 ed* (2007) 3.

[780] 1936 AD 334 at 339.

[781] Merriam-Webster Dictionary at <https://www.merriam-webster.com/dictionary/punishment> (accessed on 2018/06/11).

[782] D Garland *Punishment and Modern Society* (1990) 17; G Newman *The Punishment Response* (1978) 6-7 describes punishment with reference to the "pain or other unpleasant consequence that results from an offence against a rule and that is administered by others, who represent legal authority, to the offender who broke the rule."

> "(i) it must be unpleasant to the offender; (ii) it must be for an offence; (iii) it must be meted against an offender; (iv) it must be the work of personal agencies – thus, it must not be the natural consequence of an action; and (v) it must be imposed by a competent body or authority."[783]

Ginneken defines punishment with reference to "state's imposition of any type of sanction on a person for an act that has violated criminal law."[784] Derived from these definitions it is apparent that the concept of punishment is multifaceted. From the retributive perspective, punishment may be considered as one of the purposes of sentencing. In this manner, Ginneken elucidates that "punishment is not only considered an end in itself, but also a means to an end."[785]

In the context of corporate criminal responsibility, punishment refers to any pain or suffering imposed against the employee or agent of the offending corporation or the corporation itself by the state or any competent body. This definition envisages the effect that both the servant (employee) and the corporation itself may be subjected to punishment – together or to alternate between servant and corporation. The analysis on corporate punishment is shaped by various approaches that may influence how punishment may be perceived. These include philosophical,[786] sociological,[787] nominalist and realist approaches. The nominalist approach prefers to punish individuals for crimes committed by corporations on one end, and on the other end the realist approach advocates for punishment to be imposed on the corporation itself for crimes committed by the corporation. The discussion that follows analyses how an individual servant (employee) of the

[783] P Bean *Punishment: A philosophical and criminological Inquiry* (1988) 5.
[784] E F J C Van Ginneken "The pain and purpose of punishment: A subjective perspective" (2016) Howard League What is Justice? Working Papers 22/2016 at <https://howardleague.org/wp-content/uploads/2016/04/HLWP-22-2016> (accessed on 2018/06/11).
[785] Van Ginneken "The pain and purpose of punishment: A subjective perspective" 8.
[786] Under this perspective the debate on punishment is centred on three theories of punishment, namely absolute, relative and combined theory. The main idea is to establish an acceptable basis for punishment. This is an acknowledgment that there is no single accurate theory of punishment or all-embracing theory.
[787] The main argument is that punishment is a product of societal structure. Thus, this perspective perceives punishment as social phenomenon which is centred and influenced by social thinking.

corporation and or corporation itself may be subjected to punishment under corporate criminal responsibility.

6 2 1 Individual punishment in the context of corporate criminal responsibility

It was demonstrated in various chapters of this dissertation that nominalists argue that corporations cannot commit crimes; corporate crimes can only be committed by individual employees attached to the corporation. For this reason, the nominalist approach does not envisage punishment against a corporation itself, rather it advocates for imposing punishment against individual employees of the corporation. The basis for this advocacy, hinges on the assumption that individuals has a soul to damn and a physical body that can suffer harm. In contrast, a corporation lack these human characteristics. In this manner, the nominalist approach contemplates to punish the employee or servant of the corporation who committed the crime or who failed to act positively to avoid the commission of a crime – provided the derivative liability requirements are satisfied.[788]

The derivative liability requirements distinguishes the individual punishment contemplated in light of corporate criminal accountability from the general or ordinary individual criminal responsibility which may attach to individuals other than employees or servants of the corporation (any person who is not linked to the corporation – to justify the application of corporate criminal responsibility principle). The forms of penalty that may be imposed on a servant of a company under corporate criminal responsibility are similar to the general forms of penalty that may attach under the individual criminal responsibility.

Imposition of punishment onto a servant or employee of a corporation under corporate criminal responsibility has a history. There are several assumptions that underpin imposing penalty on the servant of the corporation for corporate crime. These assumptions include

[788] Derivative liability requirement as was identified in chapters of this dissertation above includes "(a) conduct of an employee of the corporation; (b) in the course or scope of employment or furthering the employer's interest, etcetera."

that imposing punishment on the corporation to the exclusion of the corporate's servant "fails to sufficiently provide incentive for directors to implement adequate strategies to ensure that their corporations avoid breaching the law."[789]

There are certain circumstances where the corporation may be used as a front by its servants and shareholders. Under these circumstances, imposing punishment on the corporation itself may not be the appropriate deterrent strategy. It resonates that for corporate criminality to be effectively deterred, there is a need for a holistic approach. Cowan argues that "one of the ways to deter corporations without incurring the undesirable externalities associated with fines is to prosecute the culpable individuals within the organisation."[790] Punishment against individuals may, among others, include imprisonment, fines and warnings. Detailed discussions on the type of sanctions that may be imposed on individual offenders in the context of corporate punishment are discussed in the section that discusses sanctions below.

6 2 2 Punishment of a corporation in the context of corporate criminal responsibility

Contrary to the nominalist approach discussed in the section above, the realist approach recognizes the need to punish both the servant (employee) and the corporation itself as elucidated in previous chapters. However, its primary goal is to inflict punishment on the corporation itself. Under the realist approach the form of punishment may include deregistration of the corporation, adverse publication, criminal fines, and suspension of corporate trading licence. These forms of punishment are explored in the sanctions section discussed below.

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[789] M Welsh & H Anderson "Directors' personal liability for corporate fault: An alternative model" (2005) 26 *Adelaide Law Review* 299 301.

[790] A Cowan "Scarlet letters for corporations? Punishment by publicity under the New Sentencing Guidelines" (1992) 65 *Southern California Law Review* 2387 2393.

6 3 Justification of corporate punishment

This section explores as to why corporations may be subjected to criminal sanctions. Some of the reasons that seek to advance corporate punishment were stated in Chapter 1 and elsewhere in this dissertation. However, it is important to identify and discuss some of the reasons that justify corporate punishment in detail. The discussion on corporate punishment is divided in two schools of thoughts. First, the nominalists who argue that companies are abstract entities or mere fictions – thus, they should not to be subjected to – alternatively they should be exempted from criminal punishment. Rather, individual servants or employees ought to be punished.[791] The nominalists suppose that corporations do not have a physical body to suffer punishment. The second, is the realists "who affirm the existence of collective entities over and above their individual members."[792] The assumption been that companies can commit crimes, hence, the corollary ought to be that they could also suffer criminal punishment.

There are several reasons that are advanced by both the nominalists and realists on the question of whether corporations must be subjected to criminal punishment or not. Before unpacking these reasons, it is important to elucidate the presumption of criminal punishment. The presumption of punishment helps to place the discussion in its proper context. Generally, it is presumed that crime must be punished. This presumption is not limited to punishment of individuals, rather, the scope of punishment may include subjecting corporations and even states to "punishment", as the circumstances may require.[793] Of course, this presumption entails that "punishment occurs as a natural response to

[791] Dan-Cohen (2010) *Journal of Law and Policy* 18 posits that reductionist (nominalist) "maintain that to talk about collective entities is to use a shorthand or indulge in a fiction, and in either case is to designate nothing but the multitude of individual agents and their interactions."
[792] Dan-Cohen (2010) *Journal of Law and Policy* 18.
[793] S Rich "Corporate criminals and punishment theory" (2016) XXIX (1) *Canadian Journal of Law and Jurisprudence* 97-118.

wrongdoing instead of a conventional creation."[794] The essence here is that, as Lorca argues, offenders are punished not because the punisher intends to punish them, rather because "punishment is a natural consequence of crime – therefore, it is the criminals who have brought punishment upon themselves."[795]

The factors that underpin the discussion on whether to criminally punish corporations or not may be broadly identified as follows: *First*, the moral blameworthy person and practical personality argument. Blameworthiness here refers to having done something wrong and taking responsibility for such wrong.[796] Goudkamp argues that blameworthiness is the bedrock or "foundation of liability."[797] The assumption been that blame[798] "on the part of the offender justifies allocating punishment for a crime committed by such offender."[799] Some scholars argue that blameworthiness is influenced by a number of propositions, including that:

> "(a) to be blameworthy, one must have made a choice to engage in conduct which causes an undesirable outcome; (b) the relevant choice only exists if the individual could have conducted themselves so as to avoid the undesirable outcome; and (c) an undesirable outcome can only be avoided by way of a choice if the individual foresaw that outcome."[800]

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[794] R Lorca "The presumption of punishment: A critical review of its early modern origins" (2016) XXIX (2) *Canadian Journal of Law and Jurisprudence* 385 385.

[795] Lorca (2016) *Can J Law and Jurisprud* at 385; Dan-Cohen (2010) *Journal of Law and Policy* 44.

[796] G Watson "Two faces of responsibility" in G Watson *Agency and answerability* (2004) 289 describe blameworthiness to involve the idea of liability to sanctions or certain adverse or unwelcome treatment; see, A B Carlsson "Blameworthiness as deserved guilt" (2017) 21 *Journal of Ethics* 89115.who posits that "agents are only blameworthy for that over which they have either direct or indirect control."

[797] J Goudkamp "The spurious relationship between moral blameworthiness and liability for negligence" (2004) 28 *Melbourne University Law Review* 342-373 at 342; D Owen "The fault pit" (1992) 26 *Georgia Law Review* 703.

[798] Carlsson (2017) *Journal of Ethics* 92 defines blame as to be understood as a negative attitudes: indignation, resentment and guilt – he explains that "we feel resentment when the wrongdoing is directed towards ourselves, and indignation when the wrongdoing is directed to others. (…) these reactive attitudes have a rebuking character, which set them apart from contempt and shame."

[799] Goudkamp (2004) *Melb Univ Law Rev* 342.

[800] Goudkamp (2004) *Melb Univ Law Rev* 347; S Perry "Risk, harm and responsibility" in D Owen (ed) *Philosophical foundations of tort law* (1995) 341.

In this context moral blameworthiness is construed to be concerned with the person's state of mind and not necessarily the conduct which may be committed without the requisite *mens rea.*[801] Inbar *et al* argues that "[a] blameworthy action is one where an agent causes harm to another and does so intentionally or where the harm was caused accidentally – these acts may include acts which are performed with intention to harms another even if such acts fails."[802] The concept of moral blameworthiness underscores that an individual can be blamed for the committing a crime (to have caused the harm) if such individual possessed the requisite *mens rea* to do so.[803] The question as to whether a corporation may qualify as a moral blameworthy person is contentious. The nominalist school of thought argues that corporations should not be construed as moral blameworthy persons because they do not possess full faculties of their own – equivalent to faculties possessed by natural persons. By explication, this entails that corporations are akin to objects and do not have an independent state of mind. Corporations are not moral agents; moral agency is an intrinsic human characteristic. Corporations thus rely on the state of mind of their servants. Corporations ought not to be subject to the same constraints that are applicable to natural persons. In this context, the nominalists posit that "punishing corporations requires forcing them, conceptually as well as normatively, into a pre-existing procrustean bed designed to accommodate a different type of inhabitant."[804]

The essence of the nominalist argument is to demonstrate that the criminal law principles which are founded on individual criminal responsibility should not be applied in the same fashion to corporations as they are applied to individuals. The assumption is that if corporations ought to be criminally punished – such punishment should be conceptually and

[801] Carlsson (2017) *Journal of Ethics* 115; D A Pizarro, D Tannenbaum & E Uhlmann "Mindless, harmless and blameworthy" (2012) 23 *Psychological Inquiry* 1 4.
[802] Y Inbar, D A Pizarro & F Cushman "Benefiting from misfortune: When harmless actions are judged to be morally blameworthy" (2011) XX(X) *Personality and Social Psychology Bulletin* 1-11 available at <http://pspb.sagepub.com> (accessed on 2018/06/26).
[803] K G Shaver *The attribution of blame: Causality, responsibility and blameworthiness* (1985) 70.
[804] Dan-Cohen (2010) *Journal of Law and Policy* 17.

normatively distinct from those which are applicable to individuals. The underlying rationale for this assumption is that individuals are moral agents; corporations are not.[805]

These nominalist assumptions are challenged by the realists who argue that corporations can be construed as rational agents. The rational agent status is, from the realist perspective, construed as a necessary condition to confer on corporations moral agency.[806] The argument is that if it is conceivable that corporations are rational agents, then, moral responsibility ought to attach. Rich posits that the concept of rational agency in the light of corporate punishment refers to the following:

> "A corporation is more than a simple object, and that imbuing it with attitudes and judgements is not the same as imbuing a machine with the same. It means that the agent responds to reasons, but it is more than that. It also means that the agent has some self-awareness, and that it takes responsibility for its attitudes and actions over time. While corporations' actions are constituted of the decisions of multiple people, the group becomes distinct from the individuals that constitute it, with decisions that can sometimes diverge from the decision of a majority of group members if they decide alone for a corporation."[807]

These rationality attributes demonstrate the autonomous nature of corporations. It follows that body corporates can take or make decisions that are distinct from the personal decisions of its servants. This aligns with the "controlling mind" theory and the concomitant notion that the corporate entity can only have one intention, not the multiple intentions of the individual employees, but the intention formed by the "controlling mind" of the single juristic entity.[808] Thus, when the servants of the corporations make decisions for the company, such

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[805] For thoughts by exponents of the nominalist school, see H van Eeden, K Hopkins & C Adendorff "Criminal liability of moral blameless corporations" (Sept 2011) *De Rebus* 27 at 29.

[806] Rich (2016) *Can J Law and Jurisprud* 103 who argues "[t]hat corporate moral agency requires rational agency in order to exist and further that corporations are kind of entities that can properly be brought within the ambit of retributive punishment framework."

[807] Rich (2016) *Can J Law and Jurisprud* 104.

[808] For an application of this theory, see *Burg Trailers SA (Pty) Ltd v ABSA Bank* Ltd 2004 (1) SA 284 (SCA) at para 7.

decisions are attributed to the company. The object here, being to ultimately reflect and align such decision with the single corporate intent. Pettit[809] identifies the autonomy of corporate intention with reference to the application of what he terms the *discursive dilemma*.

Through the concept of *discursive dilemma* Pettit gives an example of three directors who must adopt by means of votes several decisions that will in turn inform the course of corporate actions. The first director tenders a proposal (A) for the purchase of a new fishing boat. The second director proposes two things, (B) that some safety provisions to be installed in the boat – which turns out to be expensive, and (C) the boat to be docked near a popular bay, which is inked for lucrative fishing. The first director votes for proposal A and against B and C. The second director votes for proposal C but against A and B. The third director votes for proposals A, B and C. The outcome of the votes, which is in turn is called "corporate decision", is to purchase a new fishing boat without installing security measures and to fish adjacent a popular bay.

The *discursive dilemma* demonstrates that none of the directors (individually) wanted this type of conclusion to be reached. As Rich posits, "each director may depart with understanding that the corporate position is not really a reflection of his or her own views."[810] It therefore follows that the corporate decision may not be traced to any specific individual director. Rather the decision reflects the corporate intention.[811] In the event that the fishing boat causes injuries to someone on account that such a boat lacked the necessary safety provisions, it becomes difficult let alone unfair to hold the directors in their individual capacities responsible. Thus, the corporation itself ought to be responsible for the harm caused.

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[809] P Pettit "Responsibility Incorporated" (2007) 117 *Journal of Ethics* 171 at 181.

[810] Rich (2016) *Can J Law and Jurisprud* 104.

[811] See, Dan-Cohen (2010) *Journal of Law and Policy* 25 who argues that "[i]nformation related functions are generally imputed to the organization, rather than to specific individuals, because the total information that leads to a certain decision, action, or product is not normally possessed by any single individual, nor is it just the combined knowledge possessed by a number of identifiable individuals. Instead, it depends on the organizational structure."

Recognition of corporate decisions to be distinct from the individual members' decisions (autonomy of corporations) taken together with the legal personality of corporations[812] inform the argument in favour of practical personality.[813] Practical personality is a "notion which is designed to answer the question of whether applying sanctions to an entity makes sense, in that it spells out the preconditions for using coercive power as a measure of control with respect to corporations."[814] Simply put, is it practical to attribute blame on corporations? If so, what are the conditions that must be satisfied for such blame to be attributed? Partly, these questions are addressed by the preceding discussion on corporate decision making process. The other way of addressing these questions is through the lens of legal personality of corporations.

A detailed discussion on the legal nature and effect of corporate legal personality were discussed in detail in Chapters 1 and 2 of this dissertation. However, suffice to state here that the essence of corporate legal personality is to confer corporations with rights, privileges and corresponding obligations as well as recognising corporations as persons. These rights and obligations serve as preconditions that effectuates or affords corporations to perform practical activities, such as taking and implementing corporate decisions, recruiting corporate servants, signing of corporate documents, sue and be sued.

The *second* argument relates to the punishment of innocent persons. There are competing propositions on the question of whether corporate punishment should be abandoned on account that it unjustly subjects innocent persons to punishment. Innocent persons referred to under this argument, from the nominalist perspective; include

[812] See detailed discussion on corporate legal personality in chapters above.
[813] Dan-Cohen (2010) *Journal of Law and Policy* at 25 argues that practical personality requires that "we be able to ascribe to the corporation causal efficacy which includes some form of instrumental rationality manifested as much in the harnessing of the corporation's causal power to the pursuit of some goals as in responsiveness to norms and threats that back them up. This involves, among others, representations of actions designed to thwart in one way or another corporation's pursuit of its guiding goals and interests."
[814] Dan-Cohen (2010) *Journal of Law and Policy* 26.

employees, creditors, consumers and shareholders of the corporations.[815] In contrast, the realist in a counterclaim discards the nominalist argument with an analogue of the unintended effects of punishment imposed on individuals. From the context of punishment against individuals, the realist describes innocent persons with reference to the dependants of the individual on whom the sanctions are imposed.

The nominalist argues that corporate punishment should be discarded on grounds that the corporations cannot truly suffer harm. Rather, corporate punishment may lead, as Dan-Cohen puts it, to "punishing the innocent, even in the service of some desirable goals, amounts to treating an individual as a means rather than as an end, in violation of human dignity."[816] The underlying assumption that influences the nominalist's line of thought is the infamous statement that a body corporate lacks the soul to damn but the soul of its servants and no body to kick but the body of its servant. In this context, punishment is understood to be "inflicted on human beings whose guilt remains unproven."[817]

Nominalists identified several ways through which innocent persons may suffer as a result of corporate responsibility. These include: a) loss of employment and fringe benefits by employees; b) shareholders may lose their investments and profits; and, c) in order to alleviate the burden of punishment (fines) the corporation may increase the product price to raise funds for purposes of using the profits to douse the fine. In this manner, the product price raising technique has the potential to indirectly cause the consumers to pay the fines.

These nominalist arguments are challenged by realists, who firstly elucidate the effect of sanctions on the dependants of a punished individual. The argument is that it is inevitable for the effect of punishment to extend beyond the offender (individual or corporation) and to negatively impact on third parties (dependants, employees, and so on). This is the

[815] A W Alschuler "Two ways to think about the punishment of corporations" (2009) 46 *American Criminal Law Review* 1359 1367.
[816] Dan-Cohen (2010) *Journal of Law and Policy* 22.
[817] Alschuler (2009) *Am Crim Law Rev* 1367.

unintended consequences of punishment. Therefore, it follows that it is unnecessary to advance the argument related to the impact of punishment on innocent third parties in an attempt to use such argument to discredit corporate punishment on one hand, and on the other hand fails to use the same argument against individual punishment. The basis for this averment is that the approach is selective and unfairly distinguishes the effect of punishment between third parties in corporate cases and those of individual cases.[818] On this score, Beale posits that "[c]orporate punishment falls on the entity, though the effect is felt by the shareholders."[819] Similarly, in the case of individuals, the effect of punishment extends beyond the punished individuals to include family members and dependants of such a punished individual.

The *third* argument relates to the efficacy of criminal punishment. The concept of efficacy entails the ability to yield a desired outcome.[820] The question to whether corporate criminal punishment is effective to dissuade corporate criminality continues to be at the centre of the debate among scholars.[821] The sceptics problematize the notion of "corporate crime" by questioning whether corporate crime is truly wrongful and in turn advocates for regulatory enforcement as the appropriate scheme of handling breaches committed by corporations. In contradistinction, the proponents of corporate criminal punishment affirm that corporations are capable of committing grave violations.

The argument here is that the utilisation of regulatory enforcement is not effective enough to dissuade corporate crimes. The argument is grounded on the proposition that

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[818] See, S S Beale "A response to the critics of corporate criminal liability" (2009) 46 *American Criminal Law Review* 1481 1485 who argues that "it is not possible to distinguish in a meaningful way the innocent third parties in corporate cases from the innocent third parties who are typically affected by prosecution of individual defendants."

[819] Beale (2009) *Am Crim Law Rev* 1486 state that "when individual defendants are ordered to pay criminal fines, or imprisoned and unable to earn income, the purpose is to punish the defendant, though the effect extends to those who are dependent, directly or indirectly upon the dependent."

[820] L Dunford & A Ridley "No soul to be damned, no body to be kicked: Responsibility, Blame and Corporate Punishment" (1996) 24 *International Journal of the Sociology of Law* 1 19.

[821] D M Nagy "Criminalization of corporate law: The impact of criminal sanctions on corporate misconduct" (2007) 2(1) *Journal of Business and Technology Law* 111 114.

corporations can easily calculate the cost of compliance against those of damages. Thus, if corporations are exempted from criminal sanctions, the chances of dissuading them with administrative or civil and regulatory enforcement mechanisms may prove futile.[822] In contrast, the stigma associated with the imposition of criminal sanctions has the potential to deter corporate crimes. Dan-Cohen, in defence of corporate punishment, recognizes the value of civil and administrative penalties. However, he found that these civil and administrative penalties are not effective to deter corporate criminality. For this reason, he posits that "without criminally sanctioning the corporations, we face therefore an accountability and enforcement deficit."[823] The effectiveness of criminal sanctions imposed on corporations is discussed in more detail, below, in the section that deals with specific forms of sanctions.

The *fourth* argument relates to "putting an end to impunity." The argument for disrupting impunity for core crimes is a normative and policy imperative linked to the broader human rights and international criminal justice movements. These aspirational norms are also reflected in the Preamble of the Rome Statute. The relevant part of the Preamble provides that the international community are determined "to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community as a whole] and thus to contribute to the prevention of such crimes." [824]Of course, as things currently stand, the strategies to end impunity for the atrocity crimes *may*, at the domestic level, include the prosecution of human beings (individual) and also body corporates, but it *certainly* excludes the prosecution and punishment of corporations at the ICC itself, as we

[822] See, J E Fisch "Criminalization of corporate law: The impact on shareholders and Other Constituents"(2007) 2 (1) *Journal of Business and Technology law* 91-95 at 91 who posits that "the reason for prosecuting corporations is that there have not been adequate civil or enforcement alternatives to ensure adequate legal compliance."; Rich (2016) *Can J Law and Jurisprud* 98.
[823] Dan-Cohen (2010) *Journal of Law and Policy* 28.
[824] See, Para 5 of the Preamble of the Rome Statute of the ICC.

now know. It is precisely because of this "impunity gap" vis-à-vis corporations that the writing of this dissertation was undertaken in the first place.

It was demonstrated in chapter 4 of this dissertation that companies can commit crimes. Further, that at domestic level, corporations may be prosecuted and criminally punished. In contrast, at international level, there are no enforcement mechanisms that are designed to hold corporations criminally liable. The lack of enforcement machinery, notably at the ICC, has a potential to shield corporations from been subjected to scrutiny and as a result corporation may enjoy impunity for international crimes. Dan-Cohen argues that "the failure to punish corporations is to exempt some powerful agents, capable of great social harm, from a significant instrument of social control."[825] This noted exemption (condoning impunity) can be avoided by extending the ICC's jurisdiction to cover offences committed by companies.

The *fifth* argument is concerned with rights and obligations of corporations as the catalyst for corporate punishment. Literature suggest, as was demonstrated in chapter 4 of this dissertation, that corporations have rights under domestic and international law.[826] These rights, *inter alia*, include: *the right to sue and be sued*, *acquire property*, *conduct business*, and so forth. Corporations are recognized as legal persons with capacity to act. Some of the corporate acts, undeniably, may be construed as wrongful or unlawful acts that violate criminal law norms. Derived from this reality, the proponents of corporate punishment argue that since corporations possess rights both at domestic and international levels, it makes sense that there must be corresponding obligations. Breaches of such obligations should also be subject to criminal sanctions, where appropriate. This argument invokes balancing two competing factors, namely the rights of corporations on one hand, and on the other hand the corresponding obligations. This argument challenges the prevailing international law

[825] Dan-Cohen (2010) *Journal of Law and Policy* 17.
[826] See, R J Rafalko "Corporate punishment: A proposal" (1989) 8(12) *Journal of Business Ethics* 917-928.

approach (orthodox approach) which confers rights on corporations without providing corresponding consequences for breaches committed by corporations (in the course) when such corporations exercise their rights.

6 4 What purpose does corporate punishment serve?

The theoretical objectives for criminal punishment include deterring and preventing the commission of crimes, to rehabilitate and reform the offender, to restore the breached balance, and retribution.[827] These theories of punishment are discussed below in the context of corporate punishment with special emphasis on the potential application of these theories by the ICC with respect to guilty corporations. The theories underpinning criminal punishment may be classified in three categories, namely: absolute, relative, and combination theory. In the discussion that follows, these theories are analysed in the context of corporate punishment. These theories are not limited to national level – rather they may be applied at international criminal law level.

The theories of punishment are included in various articles contained in the text of the Rome Statute and has been interpreted and applied by the ICC, of course in the context of individual criminal responsibility.[828] In *Jean-Pierre Bemba Gombo*, the tribunal held that "accordingly, the Chamber considers that the preamble establishes retribution and deterrence as the primary objective of punishment at the ICC."[829] It follows that the ICC does not favour one single theory as the only correct theory – rather it advocates for a combination of various theories of punishment.

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[827] On the traditional 'absolute' and 'relative' theories of punishment, see C Roxin, "Prevention, censure and responsibility: The recent debate on the purposes of punishment" in AP Simester, A Du bois-Pedain & U Neumann (eds) *Liberal Criminal Theory – Essays for Andreas von Hirsch* (2014) 23 42.

[828] In *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08, Trial Chamber III, Decision on Sentence Pursuant to Article 76 of the Statute delivered on 21 June 2016, para 8 provides that the "applicable law when issuing punishment include the Preamble, art 23, 76, 77 and 79 of the Rome Statute of the ICC as well as Rules 143, 144, 145 and 147 of the Rules of Procedure and Evidence of the Rome Statute of the ICC."

[829] Para 10.

The lack of a clear sentencing philosophy in the Rome Statute and the concomitant possibilities regarding the application of multiple theories (in combination), should not distract from the overarching aim of the ICC stated in the Rome Statute Preamble paragraph 4, namely to "put an end to impunity for the perpetrators of the crimes" within the jurisdiction of the ICC, thus contributing to combating the offences. This may suggest a stronger emphasis on the deterrence theory; however, commentators have pointed out that even paragraph 4 of the Preamble should not be taken to mean that deterrence "will serve as the primary factor in sentencing offenders."[830]

6 4 1 Absolute theory

The absolute theory, according to Kemp *et al,* underscores the restoration of the "balance that was disrupted"[831] by an offender's unlawful conduct. Thus, it may take the form of retributive or restorative measures which is distinguishable from vengeance.[832] Based on an offender's free will, the consequences or results of his or her conduct may attach personal responsibility or such offender may be held personally responsible for disrupting the legal balance.[833] Suffice to state that the focus of retribution is not necessarily futuristic in nature, rather it is based on the past.

In this manner, punishment is perceived to be justifiable because it is "just an end in itself."[834] Rich posits that punishment under the retributive approach is issued against the offender, "because the offender deserves the punishment in direct proportion to her or his

[830] A Hole "The sentencing provisions of the International Criminal Court" (2005) *International Journal of Punishment & Sentencing* 37 54.
[831] Kemp et al *Criminal Law* 20.
[832] See, Snyman *Criminal Law* 12 where he distinguishes between retributive and vengeance and posits that vengeance refers to the idea of 'eye for an eye' which he explains that it is the primitive premise of the absolute theory. This ancient perceived meaning of absolute theory is rejected by modern writers who contend that retributive theory's premise is to "restore the legal balance which was disrupted by the commission of the crime."
[833] Kemp *et al Criminal Law* 21.
[834] Snyman *Criminal Law* 11.

blameworthiness in committing the offence."[835] This theory is not foreign to the jurisprudence of the ICC. In *Jean-Pierre Bemba Gombo* the tribunal described retribution and contrasted it with vengeance:

> "Retribution is not to be understood as fulfilling a desire for revenge, but as an expression of the international community's condemnation of the crimes. In this way, a proportionate sentence also acknowledges the harm to the victims and promotes the restoration of peace and reconciliation."[836]

Currently, as it was stated in other Chapters of this dissertation, the Rome Statute of the ICC does not recognise corporate punishment. Therefore, the absolute theory which is contemplated by the text of the Rome Statute is aimed at punishing an individual. In the context of corporate punishment, the absolute theory does not appear to pose insurmountable challenges when applied to corporations. For instance, it was demonstrated in Chapter 5 that corporate will and intention may be derived from its culture and policies – in this respect it is sufficient to reiterate that corporations may contemplate in its policies the cost of committing a crime against the benefit thereof. A classic example, in the context of product liability, is that of Ford Motor Company, where it was noted that the "company created an internal report that calculated that paying out civil costs to burn victims would be less expensive than recalling and fixing all fault vehicles which were sold out."[837]

It follows that to effectively punish this type of corporate conduct may require, among others, the application of retributive theory. The issue as to whether a company lacks a

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[835] Rich (2016) *Can J Law and Jurisprud* 100.

[836] ICC-01/05-01/08 Trial Chamber III, Decision on Sentence Pursuant to Article 76 of the Statute delivered on 21 June 2016, para 11.

[837] Rich (2016) *Can J Law and Jurisprud* 99 he provides salient facts of Ford Motors Company that "employess of the Ford Motor Company were under pressure to produce an inexpensive and compact vehicle. In order to do this, they put the car's fuel tank in the rear. They became aware that the car's design, including its fuel tank placement, meant that some number of car passenger would likely suffer extreme burns or death. The so the car was left unsafe, and more deaths resulted – it was apparent that the problem with the vehicles could be fixed with an inexpensive improvement which required placing a piece of rubber around the gas tank which could cost US$5.00."

physical body to be subjected to suffering – as required by the precepts of the absolute theory – should not limit the inquiry. It is rather suggested that suffering should not be limited to the physical nature of the offender but may take other forms including, as Rich puts it, the imposition of fines that reflects the "higher upper limits"[838]or which are proportionate to the harm caused. This proposition on sentencing policy is supplemented and discussed in detail below. Under the retributive theory the rationale for prosecuting a corporation, ought to be construed as the condemnation of the atrocities committed and its desire of working towards impunity free society.

6 4 2 Relative theory

The relative theory, unlike the absolute theory, is futuristic and it discards the concept of free will. It presupposes, as Snyman puts it, that "man does not have a freedom of choice but is the victim of outside forces."[839] Important to note that the relative theory encompasses three approaches: First, the preventive approach, that is the underlying rationale for punishment is to prevent the repetition of crime. The object is to incapacitate the corporate entity or render such entity incapable to commit an offence for the second or subsequent time.[840] At early stages of civilisation irrational and drastic punishment measures which lacked proportionality to crimes committed were applied. For instance, if an offender committed a crime, such an offender could be subjected to maiming or death (the ultimate prevention).

Under this approach, it follows that to effectively prevent the repetition of corporate criminality, it may require utilisation of mechanisms such as suspension of licence to do business and compulsory winding up.[841] Primarily, the object of punishment is to disable the

[838] Rich (2016) *Can J Law and Jurisprud* 99.
[839] Snyman *Criminal Law* 14.
[840] Kemp *et al Criminal Law* 21.
[841] The terms "winding-up" and "liquidation" are sometimes used interchangeably. Both terms refer to the dissolution of a corporate entity, the selling off of the asserts owned by the corporation and the distribution of

offender. In the context of corporate punishment, even though body corporate cannot physically be incarcerated, "[i]t may be harmed, among others, by means of forfeiture of its assets and suspension of its licence to trade or conduct business."[842] In this manner, a corporate entity may suffer because, for instance suspending a trade licence of a corporation negatively affects such corporation's goals, including frustrating its profit margins. In the same manner, forfeiture of a corporation's assets makes it relatively difficult for such a corporation to reconstruct itself. This prevents the corporation from disguising itself under a new name or where such corporation contemplated relocation – thus, rendering the preventative theory effective and suitable to be applied on offending corporations.

Secondly, the deterrence approach is also understood to be derived from the perception that "people choose to violate or obey the law after calculating the gains and consequences of their actions."[843] That is, offenders calculate the cost and benefit of committing a crime – if the benefits exceed the cost, then an offender may be motivated to commit an offence.

The underlying assumption is that the offender is rational and capable to take decisions. In the context of corporate punishment, it was demonstrated in chapter 5 that a corporate entity is capable to set its goals, take decisions and implement such decisions. Under these circumstances, for the deterrence theory to be effective, punishment (cost) must be relatively higher than the pleasure (benefits) obtained by the offender from the crime in question. Deterrence may take the form of either general[844] or specific forms.[845] In *Jean-Pierre Bemba Gombo* the tribunal held that "with regard to deterrence, a sentence should be adequate to discourage a convicted person from recidivism (specific deterrence) as well as to ensure that those who would consider committing similar crimes will be dissuaded from doing so

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the proceeds to legitimate creditors and other interested parties. See, in general, D Davis (ed) *Companies and other business structures in South Africa* 2ed (2010) 226-228.

[842] Rich (2016) *Can J Law and Jurisprud* 110.

[843] S G Shaham, O Beck & M Kett *International Handbook of Penology and Criminal Justice* (2008) 349.

[844] General deterrence seeks to deter would be offenders other than the offender who is punished from commission of crimes in the future.

[845] Specific deterrence aims to deter the offender in question from committing (repetition) offences in the future.

(general deterrence)."[846] The assumption, unlike for retribution, is that punishment is inflicted to dissuade the actual or would-be offender from committing crime in the future. The emphasis is on the lesson taught to the offender and would-be offenders.

Third, is the reformative approach, which entails that the purpose of inflicting punishment is to reinforce the character of the offender or to enable such an offender to overcome or resist the temptation of committing crime in the future. In this manner, punishment is perceived to reform or correct the offender. Thus, reformative punishment is thought to re-educate the offender for such offender to become a responsible and useful member of the community.[847] Henning argues that "criminal sanctions are appropriate for a corporation – when the goal of the criminal prosecution is rehabilitation of the organisation to change its corporate culture so that it can more effectively prevent future violations."[848] In effect, the reformative theory contemplates to induce corporations to put in place effective compliance programs and monitoring mechanisms that may in turn not only prevent corporate criminality but also improve corporate governance.[849]

6 4 3 Combination theory

The combination theory refers to the combination of absolute and relative theories of punishment. Absolute and relative theories should not be regarded as mutually exclusive. When applied in isolation they do not yield appropriate results. On this score, the proponents of the combination theory believes that when these two theories are combined they may produce better results.[850] At national level, for example in SA, the combination theory was

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[846] ICC-01/05-01/08 Trial Chamber III, Decision on Sentence Pursuant to Article 76 of the Statute delivered on 21 June 2016, para 11.

[847] Kemp *et al Criminal Law* 21.

[848] P J Henning "Should the perception of corporate punishment matter?" (2010) *19 Journal of Law and Policy* 83 87.

[849] On compliance as a key aspect of good corporate governance, see <https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance/> (accessed 2019/03/22).

[850] Snyman *Criminal Law* 19 states that "the courts do not reject any one of the theories, but on the other hand, they do not accept any single theory as being the only correct one to the exclusion of all the others."

applied by the Supreme Court of Appeal in *S v Zinn*[851] in which the court laid down a combination of attributes that should be considered when punishing an offender. These factors include the crime, the offender[852] and the interests of society.[853] The philosophy of punishment under the combined theory is similar to the philosophies elucidated under the absolute and relative theory.

6 5 Sanctions

Although international criminal law generally, and the ICC in particular, do not provide for specific sentencing options for corporations, it is essential to consider a few options in light of this dissertation's proposed framework for corporate criminal liability under the Rome Statute of the ICC.

6 5 1 Imprisonment

Imprisonment refers to a judicial process of placing or incarcerating a convicted offender into a correctional facility or any place designated for the purpose of admitting the convicted offender to serve his or her sentence.[854] Imprisonment is a generally recognized form of punishment and its application dates back to time immemorial. The practice of incarcerating convicted offenders continues to be relevant in the present era. Coyle *et al* argue that

[851] 1969 (2) SA 537 (A) at 540.

[852] *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 Trial Chamber I, Judgment delivered on 10 July 2012 the court is required to take the circumstances of the offender into account at sentencing stage.

[853] Snyman *Criminal Law* 19 describes these factors in relation to the theories of punishment and states that "[b]y 'crime' is meant especially the consideration that the degree of harm or seriousness of the violation must be taken into account – this implicitly refers to retributive theory; the factor of 'criminal' is understood to entail the personal circumstances of the offender, including the personal reasons which drove him or her to commit the crime on one hand and on the other the prospects of such offender of becoming a law abiding member of society – when this factor is construed in this manner it may invoke reformative theory; and 'interest of society' factor firstly may refer to the need to protect society from harm – which may fall under preventive theory, and secondly to situation which contemplate to deter community from commission of crime – which implicitly involves general deterrence theory."

[854] A Mickunas "Philosophical issues related to prison reform" in J Murphy & J Dison (eds) *Are prisons any better? Twenty years of correctional reform* (1990) 77-93; A Howe *Punishment and Critique: Towards a feminist analysis of penalty* 67.

"imprisonment is used as a tool of criminal justice policy in every country of the modern world."[855] From the philosophical standpoint, the absolutist (retributive) method requires the sentence of imprisonment imposed on the offender to be comparable to the crime committed. That is, the more severe the crime that was committed, the stiffer the term of imprisonment. In contrast, the relative theory's point of view, is that "imprisonment should be inflicted with object to serve some greater good"[856] which, among others, include to deter and or rehabilitate the offenders.

In the context of corporate punishment, imprisonment as a form of punishment is obviously not applicable directly on the corporation itself. However, it is important to state that imprisonment as a form of punishment may be an effective tool that can be used to punish corporate servants or directors who are found liable for corporate crimes.[857] It is not uncommon for directors or servants of corporations to be subjected to punishment by means of imprisonment.

In Guus Kouwenhoven's case discussed in chapter 5 of this dissertation, the accused (as director of body corporate) was charged for war crimes and arms smuggling. The accused was found guilty and sentenced to 19 years imprisonment.[858] This case is relevant to the discussion on corporate criminal responsibility, particularly the responsibility of the directors of corporations. It sends an unambiguous message to all directors that conducting business with full knowledge that such business aids or abets the commission of atrocities attracts criminal punishment. From the deterrence perspective, the punishment of Guus Kouwenhoven serves two purposes, namely, to specifically deter the offender by

[855] A Coyle, C Heard & H Fair "Current trends and practices in the use of imprisonment" (2016) 98(3) *International Review of the Red Cross* 761 762.

[856] J M Pollock (eds) *Prison today and tomorrow* (1997) 9.

[857] See, S N Durlauf & D S Nagin "Imprisonment and crime: Can both be reduced?" (2011) 10(1) *Criminology and Public Policy* 30; C Murray *Does Prison Work?* (1997) 13, who posits that incarceration, reduces the incidence of crime committed.

[858] See, A Harrison "Dutch court makes legal history by sentencing timber baron Guus Kouwenhoven to 19 years for war crimes and arm smuggling during Liberian civil war" (21 April 2017) Global witness, at <https://www.globalwitness.org/en/press-release> (accessed on 2018/06/29).

incarcerating him and to generally deter other directors and entities from committing crimes through the instrumentality of corporations.

6 5 2 Criminal fines

In criminal law, a fine refers to the sum of money that a court may impose as form of sentence on a convicted offender, including corporate entities for the crime committed.[859] A fine is a competent sentence for a crime committed.[860] For instance, the Namibian Criminal Procedure Act[861] identifies a fine as a sentence that may be imposed upon a convicted offender, including corporate entities.[862] A fine as a sentence for a crime committed can be distinguished from administrative fines, because "[u]nder pure system of administrative sanctions, regulatory agencies levies monetary penalties and the courts are often not involved, except in rare cases of judicial review of agency actions."[863]

Second, administrative fines' main object is to seek or induce the corporation to conform or to comply with the legal standards or requirements. This is contrasted with the object of punishment contemplated under criminal prosecution, which may include, as we know, the element of retribution.

Third, criminal fines, unlike administrative fines, are perceived to carry a high degree of stigma which may lead to the loss of corporate personhood and prestige.[864] This distinction, to some extent, elevates criminal fines to be an appropriate form of sanction that is available

[859] Terblanche *Sentencing* 268.
[860] *S v Angula* (CR84/2012) [2012] NAHCXD 19, Judgment delivered on 10 October 2012.
[861] Section 276(1)(f) Criminal Procedure Act 51 of 1977 (Namibia).
[862] Section 11(2) United Kingdom's Bribery Act of 2010 state "[a]ny other person guilty of an offence, (a) on summary conviction, to a fine not exceeding the statutory maximum, (b) on conviction on indictment, to a fine."; in addition see art 19(2) of the Council of Europe Criminal Law Convention on Corruption which state that "each party shall ensure that legal persons (…) shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions."
[863] R M Brown "Administrative and criminal penalties in the enforcement of occupational health and safety legislations" (1992) *30(3) Osgoode Hall Law Journal* 691 692.
[864] Brown (1992) *Osgoode Hall Law Journal* 718 elucidates that "[a] fine imposed on a corporation by a criminal court may be perceived by most people as indicating greater wrongdoing that an administrative penalty. This perception may exist because judicial pronouncements are seen as more authoritative than administrative rulings, or because the judiciary is associated with more serious crimes than administrative agencies."

against offending corporations. Further, some scholars argue that since corporations, for lack of physical body, cannot be incarcerated or committed to prison, criminal fines are appropriate for purposes of sanctioning offending corporations.[865]

It is argued that, in the context of the retributive theory, for a fine to be an effective tool of corporate punishment or to be justified as a morally appropriate response to a crime committed, it should be proportionate to the degree of the offence committed. However, in the context of the deterrence theory, in particular general deterrence, higher criminal fines may be required to effectively deter would-be corporate offenders. The theory is free from critiques, specifically, in light of the challenges which may arise in relation to heightened fines. For instance, large corporations may easily pay such higher fines; in contrast, small and medium size corporations may not afford to pay. The inability to pay the fine may tend to frustrate the object of punishment. The other issue is that the sentenced corporation may tend to increase commodity prices in order to make higher profits and thereafter pay such fines from the generated profits.[866] In this manner, innocent customers may be subjected to heighted commodity prices.

It is worth noting that in social control there is no theory that is absolute or without weakness. This is demonstrated by the existence of a myriad of theories that are available for purposes of justifying their applicability towards social control. Equally so, there is no all-embracing or single perfect form of sentence. Thus, the imposition of fines as a competent form of sentence is not an exception. However, some of the challenges associated with a fine noted above, may be avoided. To avoid these challenges, recovery measures must be adopted. That is, where a convicted corporation fails to satisfy the fine, the court may issue

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[865] P J Henning "Should the perception of corporate punishment matter?" (2010) *19 Journal of Law and Policy* 83 86 considers the "[r]eal punishment available against a corporation is a fine, which can be much more easily calibrated to redress any harm."

[866] J A Corlett "French on corporate punishment: Some problems" (1988) 7(3) *Journal of Business Ethics* 205 posits that fining a corporation is inadequate because the cost of the fines can be easily absorbed by raising consumer prices."

a warrant authorizing the sheriff to levy the amount of fine by attachment and sale of such corporate assets.[867] This measure may effectuate the enforcement of payment of fine. The issue of raising consumer price by corporations may be frustrated by government intervention through strategies on commodity price control.[868]

6 5 3 Suspension of corporate trade license

The preventative measures that may be adopted to prevent a body corporate from committing atrocities during its business operation, may include suspending its trading license. Suspension of trading license is a type of restraint that renders the convicted corporation unable to trade for a specified period of time. The rationale is that during the period of suspension, the convicted corporation may not be able to commit crimes. The effect of suspension, apart from been a preventative measure, may be reformative in nature. For instance, a suspension order may be issued against a convicted corporation to enable such a corporation to take remedial action, including compliance with the law.[869]Implicitly, this may induce corporations to alter or improve their corporate culture and put in place measures that dissuade employees from engaging in criminal activities, as well as for corporations to undertake human rights due diligence when conducting business.

6 5 4 Deregistration of corporation

Deregistration of a corporation may refer to the cancellation of the corporate entity's trading license or the termination of its juristic status.[870] Deregistration may be necessary where a corporate entity has failed to comply with specific legal provisions or where such a

[867] Section 288 Criminal Procedure Act 51 of 1977 (Namibia).
[868] H Polikoff "Commodity price and the Supreme Court" (1940) *University of Pennsylvania Law Review,* 934 935.
[869] Botswana Trade Act 5 of 2004 which entered into force on 1 April 2008, Section 19 provides that "a suspension shall be for such period as the licensing committee may determine to enable the licensee to take remedial action so as to comply with such requirements of his license."
[870] *Nulandis (Pty) Ltd v Minister of Finance and Others* 2013(5) SA 294 (KZP) para 9.

corporation has breached the law, including the commission of crimes[871] during the subsistence of its trading license. The purpose is to persuade corporations to conduct their business within the perimeters of the law or encourage corporate compliance with the law. The effect is to restrain a convicted corporation from trading which may subsequently prevent such a convicted corporation from reoffending.

If a corporation is deregistered, it continues to "[e]xist as an association of members who remain personally liable for its debts, while its assets become vested in the state."[872] In a nutshell, deregistration, just like fine and suspension of trading licence and criminal declaration, may be an effective method of corporate punishment. The reason being that it does not affect the innocent shareholder irreparably[873] but rather it encourages compliance with laws. After deregistration, innocent or interested parties have an option to rectify or to influence the corporation to comply with the law in order to have such a corporation re-registered.[874]

6 5 5 Declaration as criminal entity and adverse publication

The practice of declaring offending organisations or entities as criminal, is not foreign to international criminal law. The history of this practice is accredited to the Nuremberg legacy, as we have seen in chapter 3 of this dissertation. The impugned organisations were declared as criminal organisations because of their complicity in the commission of atrocities. It is worth noting that the effect of the declaration was not to punish the offending organisations

[871] Botswana Trade Act 5 of 2004 Section 20(1)(c) provides a license may be revoked where "the licensee has been convicted of an offence."

[872] *Nulandis (Pty) Ltd v Minister of Finance and Others* 2013(5) SA 294 (KZP) para 9.

[873] See, Corlett (1988) *Journal of Business Ethics* 205 who argues that revocation may negatively affect innocent shareholder. To this effect, deregistration may be a much effective method of corporate punishment when compared to revocation which contemplates forced windup. For instance, in Botswana in terms of Trade Act 5 of 2004, section 20(3) it provides that a "licensee shall be given three months to windup a business where the license has been revoked."

[874] *Nulandis (Pty) Ltd v Minister of Finance and Others* 2013(5) SA 294 (KZP) para 39 the court emphasized that "compliance with re-registration requirements is not a mere procedural formality but a substantive necessity for efficient management of the companies register."

per se, rather it was to facilitate or afford the Allied Powers to prosecute and punish individuals for membership in organisations that were declared criminal. In as much as the declaration was not a form of punishment, the organisations that were declared ceased to conduct their operations.

At national level, for example in South Australia, the Serious and Organised Crime Act of 2008 vests the power to issue a criminal declaration against an offending organisation on the Attorney-General. For the declaration to be made, there must be information which depicts a link between the organisation and the atrocities committed.[875] Thus, there must be evidence which indicates that:

> "The member of the organization associates for purposes of organizing, planning, facilitating, supporting or engaging in serious criminal activities,[876] and the organization represents a risk to public safety and order."[877]

The effect of the declaration, as was found in *South Australia v Totani,*[878] includes that the declaration carries no legal consequence for the declared organisation. That is, even if an organisation is declared criminal, it may continue with its existence and conducting business.[879] However, it attempts to identify persons on whom a control order may be issued and whom others may not associate with. In essence, it criminalises association with an organisation that is declared as criminal.[880] It is required by the Australian law that if an organisation is declared criminal, such declaration must be published in a government

[875] *South Australia v Totani* (2010) 243 CLR 1 at par 451.
[876] Sect 11(1)(a) South Australian Serious and Organized Crime (Control) Act of 2008.
[877] Sect 11(1)(b).
[878] (2010) 243 CLR 1 par 452 the Court held that "by itself the Attorney-General's declaration carries no legal consequences for either the organization or its members. The Act does not proscribe an organization the subject of a declaration, nor its membership of such an organization made an offence. The declaration serves the purpose of identifying persons to whom other provisions of the Act will apply. It identifies persons who may be the subject of an application for a control order under section 14(1), on the basis of their membership. It identifies persons with whom others may not associate, on account of their membership of a declared organization, if the membership is proved."
[879] Paras 167 and 397.
[880] Sect 35(1)(a) South Australian Serious and Organized Crime (Control) Act.

gazette.[881]Adverse publicity equally may have a negative effect on the corporation because it has the effect of exposing the body corporate to public scrutiny and shame.

Dunford and Ridley opine that the object of adverse publicity must not simply inflict financial loss, but that it must be done in a manner that seeks to negatively affect the standing, image or prestige of the convicted corporation.[882] In this manner, adverse publicity as a form of sanction must attract society's condemnation against the convicted corporation so that it may effectively deter the convicted corporation and would-be corporate offenders. It is submitted that the effect of declaring a corporation as a criminal organisation must to some extent depart from the Nuremburg legacy, that is, the effect must not be limited to punishing the individual or to criminalise association thereof as contemplated under the Australian law. It should rather include that if an entity is declared as a criminal organisation, such entity should, in a compulsory manner, be caused to wind up or compelled to liquidate.

On this score, suffice to state that declaring offending corporations as criminal organisations coupled with adverse publicity may be an effective sanction on corporations. This statement is premised on the theoretical assumption that for a corporation to thrive, it requires interaction or association with customers and other corporations. Thus, if this association cord is severed or cut by fear of criminal sanction against those who intend to associate with the declared corporation, surely the declared corporation's prestige and status in the society in which it operates may decline or be negatively affected.

Fombrun argues that organisational prestige, image and status are vital and "[o]f prime importance for many firms because their performance and survival depend in large part on their reputation."[883] For this reason, corporations may tend to, with all necessary measures,

[881] Sect 12.
[882] Dunford & Ridley (1996) *International Journal of Sociology of Law* 1 14.
[883] C J Fombrun *Reputation: Realizing value from corporate image* (1996) 10; On corporate reputation, see, B M Whetten & A Mackey "A social actor conception of organizational identity and its implications for the study of organizational reputation" (2002) *41 Business and Society* 393 414.

strictly guard and protect their reputations, including avoidance of any conduct that may attract declaration as criminal organisation or which may lead to adverse publication.

6 6 Conclusion

The chapter recognized that corporate punishment is not provided for under the jurisprudence of international criminal law and in particular in that of the ICC. It was demonstrated that corporations at national level may be sanctioned for the commission of crimes. However, there seems to be no consistency in the application of corporate sanctions. Jurisdictions such as South Australia allows declaration of organisations as criminal entities as well as to effectively publish such findings in the government gazette whereas other jurisdictions such as Namibia and South Africa appear to provide for payment of criminal fines, rather than declaration of corporations as criminal entities. Despite these differences, this Chapter identified potential methods of punishment that may be available for sentencing a convicted corporation. These methods include criminal fines, suspension of corporate trade license, deregistration of convicted corporations, and declaration of such convicted corporations as criminal entities as well as adverse publication thereof.

Chapter 7

Conclusion, lessons and submissions

7 1 Introduction

This Chapter constitutes the conclusion; the summary of lessons that may be derived from the preceding analysis and the main submissions. The lesson aspect of this Chapter includes lessons that culminate from the legacy of Nuremberg (both IMT and NMTs) – as to how the Nuremberg trials dealt with corporate criminal responsibility. It is important to reflect on the legacy of the Nuremberg trials. The Nuremberg trials served as the first international forum that dealt with international crimes. Further lessons on corporate liability for atrocity crimes are derived from the debates at the Rome Conference, and subsequent to that leading up to and including the Kampala Review Conference.

This Chapter also reflects on the lessons that may be derived from domestic practices. These lessons are used to sharpen and buttress the main submissions on the disconnect between domestic and international practices; the effect of non-recognition of corporate liability; the governance gap; admissibility issues (complementarity rule); and the proposal for the amendment of the Rome Statute with the effect of extending the jurisdiction of the ICC to cover corporate criminal responsibility.

7 2 Lessons on corporate criminal responsibility

Corporations can commit crimes. Therefore, they ought to be criminally sanctioned. This principle, at domestic level, is recognized in several jurisdictions. However, research indicates that this principle is not universally recognized nor applied uniformly at domestic

level.[884] Its recognition cannot, however, be overstated because even states that in the past did not recognise corporate criminal responsibility, have opted to recognise it, as was demonstrated in Chapter 2 above.[885] In contrast, it remains unrecognized at international level as a competent form of criminal responsibility.[886]

The lack of universal recognition of the corporate criminal charge, at domestic and international levels, poses a number of negative effects including, a) retarded development of this principle; b) the failure by the international community to effectively govern the activities of corporations[887]; and c) counterproductive or disjointed jurisprudence between the ICC and domestic courts, particularly with reference to the aim of "[e]ffecting an end to impunity for the perpetrators of international crimes."[888] In this regard, corporations are left at their own devices.[889] This status *quo* has up to date successfully resisted change despite countless calls and proposals for reform from scholars and other international organisations.[890]

Considering the above, this dissertation makes several submissions and proposes amending the Rome Statute. The contemplated amendment advocates for extending or widening the jurisdiction of the ICC to accommodate a corporate criminal charge. The benefits of incorporating corporate criminal accountability in the jurisdiction of the ICC were analysed in chapters 3, 4, 5 and 6 above.

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[884] See, Chapter 5 of this dissertation above; R C Syle "Corporations, veils, and International Criminal Liability" (2008) 33 *Brooklyn Journal of International Law* 955 974; S R Ratner "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111(3) *The Yale Law Journal* 443-545.

[885] See, Stessens (1994) *Int Comp Law Q* 520; Corlett (1988) *Journal of Business Ethics* 205-210.

[886] J A Bush "The Prehistory of corporations and conspiracy in international criminal law: What Nuremberg really said" (2009) 109 *Colombia Law Review* 1094 1145.

[887] Bilchitz "(2016) *BHJR* 206.

[888] Kremnitzer (2010) *J Int Crim J* 916.

[889] Gotzmann (2008) *QLSR* 36 at 46 emphasizes the need to close the governance gap and attempt to regulate corporate activities under international law and she argues that "the broader category of human rights law is continually evolving in response to the heightened awareness that limiting human rights liability to individuals and states is inadequate as this fails to regulate powerful non-state-actors."

[890] Haigh (2008) *Australian Journal of Human Rights* 199.

7 2 1 Lessons from the Nuremberg trials

The trials that were held in Nuremberg, as was demonstrated in Chapter 3 of this dissertation, were classified into two categories, namely, (a) the proceedings against the high ranking German officials held before the IMT, and (b) proceedings held in the demarcated zones before the NMTs.[891] The distinction between these proceedings is relevant because these tribunals were constituted by distinguishable instruments. Although they were for the most part focussed on the criminal liability of natural persons, the declaration of certain organisations as criminal is noteworthy for this dissertation.

The IMT was constituted in terms of the 1945 Charter of London and it dealt with the proceedings against the high-ranking Nazis, whereas the NMTs conducted its business as per the Control Council Law 10 and it dealt with the lower ranking members. In the context of corporate liability, the Charter of the IMT provided for the declaration of organisations as criminal organisations.[892] The effect of the declaration was to hold individuals (natural persons) liable for membership in those organisations that were declared as criminal.[893] If the proceedings for an offence of membership, as envisaged in Control Council Law 10, were brought against a natural person who has membership in an organisation which was declared as criminal, such declaration was acceptable proof of the criminal nature of the organisation in question. It follows that the corporate scheme from the IMT perspective was limited to the declaration of organisations as criminal. It became clear from the IMT trials that criminal responsibility for international crimes was individual.[894]

Control Council Law 10 did not provide for organisational responsibility. Rather, it created an offence of membership in the organisation that was declared criminal. It is important to

[891] See, Chap 3 of this Dissertation above.
[892] See, para 1 of Art 9 of the Charter of the IMT.
[893] See, Chap 3 of this Dissertation above.
[894] See, *Trial of the Major War Criminals before the International Military Tribunal*, (Göring and Others) 1946, IMT Vol XXII, Judgment and sentencing of the Afternoon Session of the Two Hundred and Seventeenth Day, Monday 30 September 1946.

point out, as was demonstrated in Chapter 3 above; that there was evidence that suggested that corporations participated in the commission of atrocities in various ways. These included, among others, the supply of essential war materials such as arms and ammunitions that were used in wars; production of *zyklon B* gas that was used in extermination camps; plunder, as well as the administration of slave programmes that benefited corporations and the Nazi regime.[895] Despite these contributions, corporations as such were not brought before the Nuremberg tribunals.

7 2 2 Lessons from the Rome and Kampala Review Conference

The idea of establishing a permanent court that is designed to adjudicate over international crimes dates back to the immediate post-WWII era, but gained momentum during the Balkan wars of the early 1990's.[896] After a series of events and meetings, the idea became a reality that was effectuated by the Rome Conference of 1998 which led to the creation of the ICC in 2002. At the Rome Conference, corporate liability proposals and discussions were made, as was demonstrated in chapter 3 above, however, these proposals were not adopted.

The international community (as represented at Rome) reiterated the IMT's finding that responsibility for international crimes was individual – and for this reason, they did not adopt corporate criminal responsibility.[897] There was scepticism among the members at the Rome Conference who held the view that the making provision for corporate criminal responsibility would negatively affect certain state parties' primacy rights.[898] This standpoint was

[895] See, Bush (2009) *Colombia Law Review* 1105 who avers that "during the war, the role of business in German war effort and criminality was known to be huge, as information streamed out of Europe about the extent of forcible population transfers for slave labour. Private employer ranged from small farms using forced labourers to bring the crops to facilities… corporate size was not always the equivalent of moral gravity: A small chemical firm was entrusted with distribution of *Zyklon B* to the SS at Auschwitz."

[896] See, Cassese "From Nuremberg to Rome" in *Rome Statute* 4-5.

[897] See, United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of the International Criminal Court, "Summary of Records of the Meetings of the Committee of the Whole" (1998) *UN Document A/CONF.183/13* Vol 2, 133-136.

[898] See, Schabas (1998) 6(4) *European Journal of Criminal Law & Criminal Justice* 84 95.

challenged in chapter 3 of this dissertation. It was pointed out that the logic of the complementarity principle may cause dissonance between those states that, in theory (because of domestic criminal law principles) should be able to exercise jurisdiction over corporations but decline to do that. Normally, based on the complementarity principle, the ICC would then be able to step in, but because of the jurisdictional limitation in terms of natural persons only, the ICC will not be available either.[899] The other factor that was inked to have contributed to non-adoption of corporate scheme during the Rome Conference was the lack of time.

It was apparent that more time was required by the Rome Conference in order to ventilate the issues that were raised by corporate criminal responsibility. To this effect, the anticipation was that the issue of corporate liability would be afforded enough time during the Kampala Review Conference. This anticipation did not come to fruition because corporate liability was not included on the agenda of the Kampala Review Conference.[900] Thus, for corporate criminal responsibility to return to the discussion table, there should be a demand from state parties.[901]

7 2 3 Lessons from domestic practices

It was demonstrated in chapter 2 above that the principle of corporate criminal responsibility has evolved, and it is recognized, at domestic level, in certain jurisdictions and discounted in others. From the doctrinal development perspective, it is appears that the principle of corporate criminal responsibility continues to evolve.[902] This averment is supported by the reality that some states which previously discounted this principle have opted to recognise it and include same in their legislations.[903] However, there are disparities

[899] Kyriakakis (2008) *Criminal Law Forum* 125.
[900] See, Chapter 3 of this Dissertation above.
[901] See, art 121 of the Rome Statute of the ICC on the procedure that must be complied with when proposing an amendment – an analysis of this provision was made in chapter 3 of this Dissertation.
[902] See, Bernard (1984) *Criminology* 5.
[903] See, Chap 2 of this Dissertation above.

in relation to how this principle is applied in various jurisdictions in which it is recognized – the disparities depict the lack of uniformity. From the comparative study made in chapter 2 of this dissertation above, it is revealed that the Namibian,[904] Italian[905] and South African's corporate scheme is based on vicarious liability; UK is based on a fusion of identification and corporate culture theory,[906] and; the USA been based on the fusion of vicarious liability and aggregation theory.[907]

The disparity raises a number of concerns, among others, it creates jurisprudential disjoint at domestic level. Further, it may create a situation where corporations may be forced to relocate to states that have less stringent laws and enforcement mechanisms – in order to avoid strict scrutiny. To alleviate these consequences, it is submitted below that an international forum which recognizes the principle of corporate criminal responsibility is required to harness the domestic practices and to foster a homogenous approach of putting an end to impunity for corporate offences.

7 3 Submission on the jurisprudential disconnect between the ICC and domestic courts

This section consists of the submission on the jurisprudential disconnect between the ICC and domestic courts which was identified in this dissertation. The jurisprudential disconnect is at two levels. The first disconnect level is related to domestic courts themselves. In chapter 2 of this dissertation it was demonstrated that domestic courts are divided in respect with how the principle of corporate criminal responsibility is applied. In essence, some states recognise corporate criminal responsibility on one end, and on the other end, some states adhere to the principle of *societas delinqere non potest.*[908] Needless to say that in countries

[904] See, sect 332 Criminal Procedure Act 51 of 1977 (Namibia).
[905] Italian legislative Decree 231/2001 issued on 8 June 2001.
[906] See, Chap 19 of the UK Corporate Manslaughter and Corporate Homicide Act 2007.
[907] See, Park & Song "Corporate criminal liability" (2013) 50 *Am Crim Law Rev* 764.
[908] See, generally Chap 2 of this Dissertation above.

where corporate criminal accountability is recognized – the practice lacks uniformity. The lack of uniformity is manifested in twofold: (a) lack of uniformity in the conceptual meaning and object of corporate criminal accountability principle, and (b) the lack of uniformity in the practice of sanction.

It is worth to explain here that from the conceptual perspective; corporate criminal liability refers in its strict sense to a modality that seeks to hold corporations criminally accountable for the crimes committed. Thus, the primary object of corporate criminal liability contemplates to sanction the corporations themselves and not necessarily the directors or persons representing the corporations. The other object, which is relative, of the principle deems the corporation as a mere juristic person who cannot suffer pain for purposes of sanctions – for this reason – states use the principle of corporate criminal liability to sanction directors or others persons, as the circumstances may require, liable for crimes committed.[909]

In the context of sanction, the lack of uniformity lies in the choice of theories which states adopt to effectuate and implement the principle of corporate criminal liability. On comparison, South Africa sanction corporations based on vicarious liability principle,[910] UK sanction corporations based on identification principle,[911] USA sanction corporations premised on multiple theories, namely: (a) vicarious liability, and (b) aggregation theory. Wherefore, Australia sanction corporations based on corporate culture and structural negligence.[912]

The second jurisprudential disconnect is related to the ICC and national courts – in precise: courts that recognize the theory of corporate criminal liability. Here, the disjoint appears that the ICC recognizes individual criminal liability to the exclusion of corporate

[909] See, Welsh & Anderson (2005) *Adelaide Law Review* 301.
[910] See, Sect 332 Criminal Procedure Act (South Africa).
[911] Zinnecker (1985) *Brigham Young University Law Review* 326.
[912] The Australian Criminal Code Act 12 of 1995.

criminal liability. In sharp contrast – some domestic courts recognize both individual and corporate criminal accountability. The disparity in recognized modes of criminal liability between the ICC and domestic courts has the potential to create and effectuate legal uncertainty in respect to, among others, the defences which may be available to the accused corporations.[913]

This legal uncertainty may be experienced, for example, the corporation may successfully plea lack of jurisdiction when arraigned before the ICC for any core crime. In contrast, the corporation may not succeed with the plea of lack of jurisdiction when arraigned for core crimes under national courts. By implication, these differentiated approaches to corporate criminal responsibility can be circumvented by amending the Rome Statute to encompass the corporate criminal liability principle.

7 4 Submission on non-recognition of corporate criminal liability under international sphere

The main impediment against the recognition of corporate criminal responsibility principle at international law, as was demonstrated and challenged in chapter 3 of this dissertation above, among others, is the theoretical assumption underlying the *societas delinqere non potest* principle.[914] Further, the other concern which appears to be at the core of non-recognition of corporate criminal responsibility is non-existence of political determination from the international community. Bilchitz argue that the main challenge relating to a call for a treaty or reform on corporate criminal responsibility in international sphere is the lack of

[913] Haigh (2008) *Australian Journal of Human Rights* 208.

[914] Kyriakakis (2009) *Netherlands International Law Review* 334 notes that "the comparative law problem of diverse national positions in relation to both the principle and form of corporate criminal liability has been a live issue in the debates around corporate criminal liability under international law. In some states, for example, the principle of *societas delinquere non potest* still prevails."

consensus[915] and political will from international community to recognize a company as a subject of international law for purposes of criminal liability.[916]

Gotzmann argues that "the extension of legal subject-hood under international law has been motivated by both utility and ideology."[917] She proffers that the recognition and inclusion of international organization such as the UN as legal subject of international law was based on practical reality. That is, this perspective dispenses away with the traditional theories of international law that deemed legal personality as an exclusive club of states only. From this perspective, it is suggested that legal personality under international law or to be a legal subject under international law is not engraved in a stone. Rather the concept is dynamic and fluid in nature. It is a concept that is subject of change based on needs. In this context, to discount corporation from the scrutiny of international law is to discredit the efforts of "[h]uman rights theories that rejects limiting duty holders to states or to those carrying state policies."[918]Therefore, the theoretical basis for recognizing corporations as legal subject of international law ought to hinge, among others, on the practical reality that corporations are (a) conferred with international rights and protections, (b) capable to bring litigation, enforce and defend themselves under international law, and (c) are capable to bear international duties.[919]

7 5 Submission on closing governance gap

It is common knowledge that corporations are juristic persons with rights.[920] These rights, among others, include the right to associate, transact or conduct business with other persons at domestic and or international level (for transnational corporations).[921] These

[915] Bilchitz (2016) *BHRJ* 224.
[916] Dugard *International Law* 3.
[917] Gotzmann (2008) *Queensland Law Student Review*, 36 46.
[918] Ratner (2001) *Yale Law Journal* 452.
[919] E Duruigbo "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges," (2008) *6(2) Northwestern Journal of International Human Rights* 238 to 239.
[920] Davies *Company Law* 153; *Salomon v Salomon & Co Ltd* [1897] AC 22.
[921] Ratner (2001) *Yale Law Journal* 461.

attributes signifies that corporations are global actors, and as Slye observes, corporations enjoys full protection under "international law as they are construed as proper objects of international law."[922] It was demonstrated in chapter 4 of this dissertation that through the interactions or in pursuit of the commercial activities, corporations may commit acts that may be construed as criminal. These criminal acts, without doubt, may assume serious dimensions to qualify as atrocity offences.[923]

In order to subdue or alleviate these consequences, a series of instruments both at domestic and international levels respectively as was demonstrated in chapter 3 and 4 of this dissertation above have been adopted. However, the responses to these consequences raises concerns in relations to (a) the varying approaches adopted, and (b) the effectiveness of such approaches to deter corporate criminal acts. In relations to variations in approaches – at domestic level – (i) some states may subject corporations to criminal prosecution, and (ii) some states construe corporations as mere fictions and as such deem them to be incapable of committing crimes.[924] Consequently, the latter category of states finds no justifications to subject corporations to criminal prosecutions. This latter approach underscores, among others, that companies may be held to account through administrative sanctions or civil sanctions.[925]

The variation on approaches to corporate responsibility has created governance gap. In this context, the concept of governance gap denotes a state of affairs where a corporate behaviour is criminally punished in certain jurisdictions and at the same time, such similar behaviour is not punishable in other jurisdictions.[926] This situation subsists as it is noted with

[922] Slye (2008) *Brook Journal of International Law* 956.
[923] Ratner (2001) *Yale Law Journal* 457. The international community has for a long time recognized the power which corporations possess both at domestic and international sphere with its concomitant consequences, including commission of crimes.
[924] See, Chap 2 of this dissertation above.
[925] See, Weigend (2008) *JICJ* 929.
[926] See, D Bilchitz "Human rights accountability in domestic courts: Does Kiobel increase the global governance gap?" (2013) 130(4) *South African Law Journal* 805.

the current practices at national level as was demonstrated in chapter 2 of this dissertation above.

In essence the fact that states such as UK, South Africa, France, just to mention a few, recognise corporate criminal conduct and sanction such conduct with criminal sanctions on one end, and on the other end, a same corporate criminal conduct is not recognized by other states such as Germany nor is it criminally sanctioned may be construed to constitute governance gap. The issues related to governance gap has been raised by other scholars who argue that the failure to close such loopholes may lead to corporations continuously enjoy impunity for crimes committed. Bilchitz in this regard posits that:

> "There is problem of weak governance zones: there are parts of the world in which laws are not properly enforced, human rights standards are weak and courts lack independence. How can one ensure that individuals can gain access to a remedy against corporations that violate fundamental rights in these contexts? Corporations could exploit the weakness in these countries to maximise their profits without any fear of legal consequences."[927]

The anxiety caused by governance gap is not just limited at domestic level; rather it extends into the international sphere. At international level, all the forms of corporate responsibility are not recognized (be it criminal, civil or administrative) and as such the current approach to corporate responsibility is based on corporate voluntary compliance schemes.[928] Under voluntary compliance scheme, in contrast to corporate criminal responsibility, corporations are left at their own devices or to regulate themselves.

[927] Bilchitz (2016) *BHRJ* 217; Kremnitzer (2010) *JICJ* 916 who opines that "the problem is that states alone cannot be trusted to enforce the law within their jurisdiction when international crimes are committed. The main problem is that states may prefer the investments and the economic activity of culprit-corporation over the need to protect their citizens from such corporations."

[928] The concerted effort of the international community is demonstrated by the adoption of several noncriminal norms (self-regulation by corporations). See, UN Global Compact principles; OECD Guidelines for Multinational Enterprises; International Labour Organization Tripartite Declaration of Principles Concerning Multinational Enterprises.

Literature suggests that these voluntary compliance schemes have been ineffective.[929] Of course, the obvious rational for this suggestion lies in the non-binding legal nature of voluntary compliance schemes.[930]Apart from these ineffective international voluntary compliance schemes, currently: it appears that there is no institution or forum at international level that has jurisdiction to adjudicate over international crimes committed by corporations. The lack of international forum has the potential to increase the governance gap.[931]This averment resonates from the reality that "corporations no longer operate within one jurisdiction and have capacity to cause harm in a range of jurisdictions."[932]

The fact that corporations are capable of operating or conduct business in two or more jurisdictions at the same time renders it difficult for their conduct to be effectively regulated at domestic level. This is exacerbated by the domestic approaches to corporate criminal responsibility, namely, some states do not recognise corporate criminal responsibility. The consequences here, among others, been that the non –recognition thereof, has potential to afford offending corporations an opportunity to seek safe havens in such jurisdictions – and in turn, it effectuates the governance gap.

It is therefore, this dissertation's submission that in order to effectively reduce the present governance gap, there must be an international forum that is vested with competent jurisdiction to adjudicate over corporations for international crimes. This submission does not necessarily call for the creation of another international court besides the ICC. Rather the call is to amend the Rome Statute and to vest the ICC with the jurisdiction to adjudicate over core crimes committed by corporations, as is submitted below.

Here, the proposal is that: the inclusion of corporate charge under the jurisdiction of the ICC has potential to reduce the governance gap effectively in the sense that under the

[929] Kyriakakis (2009) *Netherlands International Law Review* 352.
[930] Scholz (1984) *Law and Policy* 404; Matisoff (2015) *Policy Sciences* 126.
[931] Bilchitz (2013) *SALJ* 805.
[932] Bilchitz (2013) *SALJ* 794.

circumstances where states seized with the a corporate charge are unable or unwilling to investigate the corporations, then the ICC may activity the complementarity scheme and assume jurisdiction.[933] The submission is constructed on the contention that the ICC is the most appropriate forum that can reduce the governance gap because it has a number of attributes which may not be found at domestic level. These attributes, among others, includes a) the ICC is not limited to a specific geographical location of a state (territory) – it has a universal reach advantage, in contrast, states may lack the requisite extraterritoriality. For instance, if a corporation commits grave human rights violations in state A and relocate to state B the chances of state A to successfully prosecute such a corporation, notwithstanding the bilateral extradition treaties, are reduced significantly. This challenge may be surpassed by the ICC with fewer technicalities involved. b) The ICC is an international institution that has jurisdiction to adjudicate over atrocity crimes; in contrast, domestic courts may lack the jurisdiction over atrocity crimes. Finally, it helps in the process of legitimising corporate domestic prosecution.

7 6 Submission on extending the ICC jurisdiction to include corporate criminal responsibility

There are compelling factors that support the request aimed at extending the jurisdiction of the ICC to cover the core crimes committed by juristic persons. On this score, among others, Gotzmann argue that "[c]orporations have increased in mobility and power which affords them the ability to evade national laws and enforcement mechanisms."[934]

[933] See, Haigh (2008) *Australian Journal of Human Rights* 200 noted that "Many host states, which are often developing states where TNCs locate their production capabilities, may be unwilling or unable to effectively regulate the human rights conduct of TNCs within their jurisdiction. A host state may not have the financial or legal resources to regulate a powerful TNC. The host state may be concerned that the TNC will relocate, taking its foreign direct investment with it, if made to account for its human rights conduct. The problem is compounded if the host state has committed human rights violations in which the TNC has been complicit. A home state, the country in which the TNC's parent company is incorporated, and often a developed state, generally does not act to fill this regulatory gap."

[934] Gotzmann (2008) *Queensland Law Student Review* 41.

Corporations' mobility and conduct of business is not limited to national borders, rather, they may operate in several countries. Corporate mobility makes it easy for corporations to evade national laws and their enforcement – simply by, after committing atrocities such corporation may relocate to other countries.

Scholars are in agreement that modern corporations wield much economic power and influence.[935] This economic power can be used to exert pressure on governments – especially, in developing states – to ignore the atrocities committed by corporations. Further, as it was demonstrated in detail in chapter 4 of this dissertation, it cannot be denied that corporations are capable of committing atrocities. Therefore, it is submitted that to effectively put an end to impunity enjoyed by corporations or efforts to sanction corporations for atrocities committed must be at an international level – in this regard, through the ICC.[936]

Extending the ICC's jurisdiction to cover crimes committed by corporations has a potential, among others, to: (a) lay the foundation for developing the principle of corporate criminal responsibility – which it deserves; (b) it contribute to the efforts for respecting, upholding, and protection of human rights – which is much desired, and (c) it contributes to *bringing an end to impunity* for atrocity transgressions committed by corporations.[937] Against this backdrop, it is proposed that the Rome Statute ought to be modified or an amendment to be effected to make provision for the principle of corporate criminal liability.

The proposed amendment, among others, include, *first* – to amend article 11 of the Rome Statute to afford the ICC with the "jurisdiction *ratione temporis"* over core crimes committed by corporations "after the entry into force of" the amendment that provide for corporate criminal responsibility. The essence of the jurisdiction *ratione temporis* amendment provision (over corporate crimes) is to guard against retrospective punishment[938] and to uphold the

[935] Van Solinge "The tropical timber trade" in *Organized crime* 111
[936] Gotzmann (2008) *Queensland Law Student Review* 41.
[937] Para 5 of the Preamble of the Rome Statute of the ICC.
[938] See, art 24 of the Rome Statute of the ICC which provided that "no person shall be criminally responsible under this statute for conduct prior to entry into force of the statute."

"*nullum crimen sine lege* principle."[939] The essence of "*nullum crimen sine lege"* is to limit the ICC's jurisdiction to a criminal conduct that was recognized as crime when it was committed. Further, the recognized crime must be a crime that falls within the purview of the ICC.

Second – to amend article 25 of the Rome Statute of the ICC by means of incorporating article 25 *bis*. The proposed article 25 *bis* contemplates to provide for corporate criminal responsibility in the following terms:

Article 25 *bis*

Corporate criminal responsibility

1) The court shall, except for states, have jurisdiction over corporations ("*juristic persons*").
2) A corporation shall be found accountable and liable for a penalty for an offence under this statute, if such corporation:
   a) Individually or jointly with other corporation(s) or natural person(s) commit an offence, or
   b) Aids, abets or assists in the commission or attempted commission of an offence, or
   c) Furthers the commission or attempted commission of an offence.
3) Corporate conduct that constitute an offence, under this statute, shall be proved by establishing that:
   a) The conduct was committed by a servant or agent of the corporation.
   b) The corporate servant or agent's unlawful conduct shall be imputed on the corporation, if it is proved that such unlawful conduct was committed whilst such servant or agent was:

[939] See, art 22 of the Rome Statute of the ICC which provides that "a person shall not be criminally responsible under this statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the court."

i) in course and/ or scope of employment or agency, or

ii) in furtherance of the interests of the corporation, or

iii) in compliance with the juristic person's organisational policy, or

iv) existed a *prope nexum* between the unlawful conduct committed by servant or agent of the corporation and the corporation or organisation's business.

4) Corporate *mens rea* shall be proved by establishing that:

a) The servant or agent of the corporation authorized (expressly or impliedly) the commission of an act that constituted the offence, or

b) There exist a corporate policy or culture that authorised or condoned (expressly or impliedly) the commission of an act that constituted the offence.

5) A corporation's accountability for an offence, shall not be construed to exclude the individual criminal responsibility of the servant or agent of the corporation who is the perpetrator or accomplice of the offence.

Third – to amend article 30 of the Rome Statute of the ICC by effecting the incorporation of article 30 *bis* after sub-article (3) of article 30. The proposed amendment is to provide for the presumptions on mental element of the corporation.

Article 30 *bis*

Corporate mental element

1. A corporation shall be found accountable and liable for a penalty for an offence under this statute, if the elements of an offence are committed with intention. A corporation shall be presumed to have intention where:

a) in relation to conduct, that a corporation through its servant or agent or corporate policy or corporate culture intended to engage in the unlawful conduct.

b) in relation to the unlawful consequence,

i) a corporation, through its servant or agent intended to cause that unlawful consequence, or

ii) a corporation is aware that in the ordinary course of event the unlawful consequence will occur, or

iii) a corporate policy or culture means to cause that unlawful consequence or condones that unlawful consequence.

Fourth – to amend article 63 of the Rome Statute by means of inserting sub-article (3) to provide for a proprietor (employee, or servant, or agent) to represent a corporation during trial.

Fifth – to amend article 77 of the Rome Statute by means of incorporating article 77 *bis* to provide for penalties applicable to juristic persons in the following terms:

Article 77 *bis*

Penalties applicable to corporations

1. In respect to a convicted corporate offender, the Court may impose one of the following penalties for an offence referred to in article 5(1)(a),(b) and(c) of this statute:
   a) Criminal fine for a specified amount of money, or
   b) Suspension of the corporate trade licence for a specified period of time, or
   c) Deregistration of corporation, or
   d) Declaration of corporation as criminal entity, or
   e) Adverse publication of corporation.
2. The Court may impose a combination of any of the penalties referred to in (a), (b), (c), (d) and (e) of sub-article (1) of this article.
3. In addition to penalties referred to sub-article (1) and (2) of this article, the Court may order:

a) The seizure or confiscation of any proceeds or assets or property gained from the offence.

b) The forfeiture of any proceeds or assets or property gained from the offence.

An analysis as to how these proposed amendments would work is provided in details in chapter 5 and 6 of this dissertation. For this reason, there is no need for repetition here; however, it is important to state that corporate punishment is advantageous in many respects. For instance, the Rome Statute of the ICC contains remedies such as reparation, compensation and restitution. These remedies mainly involve monetary values. The probability is high for a corporation, unlike a natural person, to honour a reparation, compensation and restitution order of the court. This is because, corporations commands much economic power and influence than a natural person. The discussion that follows focusses on the submission on issues related to challenges that may ensue in the event that a corporate charge is recognized under the Rome Statute – mainly the admissibility of a corporate case before the ICC.

7 7 Submission on issues of admissibility of a corporate case

The inroads made by and as provided for in domestic legislations and international instruments discussed above demonstrate an appropriate step in the right direction. However, these inroads are in themselves inadequate to solve the comparative law challenge that emerged throughout or at the time of crafting the Rome Statute. The challenges, *inter alia*, included an argument that – to include a corporate charge, some states (that do not recognize a corporate charge) would be rendered "unwilling and unable to carry out the investigation or prosecution."[940] The finding of unwilling and inability to investigate or prosecute is a vital factor that triggers the ICC to invoke its complementarity jurisdiction over the international crime.

[940] Art 17(1)(a) of the Rome Statute of the ICC.

The issue of admissibility of the international crime before the ICC was determined in *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*.[941] The court determined that for a matter to be inadmissible before the ICC – domestic investigation must demonstrate that 'it covered the same individual and the same act'. Further that, mere preparation or undertaking to investigate in future is not sufficient for a successful claim of inadmissibility before the ICC. In the context of Germany and Italy, chief to this enquiry is the domestic law that exclude corporate criminal liability. Therefore, partially, the comparative law challenge may be resolved by answering the legal question to whether – if the envisaged corporate scheme was to be included in the Rome Statute could a defence or plea of defective national law be sustained under circumstances where a state fails in its obligation to implement the Rome Statute of the ICC? Conversely, can a state raise a "*defect in national law*" as defence for failing to cooperate with the ICC?

It is worth to note that article 1 of the Rome Statute of the ICC provides for complementarity rule. This rule entails that domestic courts assumes primacy "[i}n the investigation and prosecution of core crimes"[942] and not otherwise. Further, article 88 of the Rome Statute of the ICC obliges states to render the necessary cooperation with the ICC. Considered holistically, the gist of these provisions is to ensure that the state parties positively implement the Rome Statute of the ICC by putting in place mechanisms which are required in order to achieve the state's responsibilities. It then follows that, firstly in event where a domestic rule conflict with an international customary rule, in most jurisdictions, the international customary rule prevails.[943] Secondly, the *"jus cogens"* nature of core crimes dictates their direct application to domestic jurisdictions. The consequences here include that states, by virtue of *jus cogens,* may be required to cooperate, ie by means of

[941] ICC-01/09-02/11 O A, para 36 Pre-Trial Chamber II, Judgment 30 May 2011.
[942] See, art 1 Rome Statute.
[943] Art 144 of the Namibian Constitution; Sect 39(1)(b) of 1996 South African Constitution.

implementing the Rome Statute – which, by extension counters the defect in domestic law argument.

The legal question on defect in national law was adjudicated on in *Prosecutor v Tihofil Blaskic*[944] in which the court found "(…) there exists in international law, a universally recognized principle whereby a gap or deficiency in municipal law or any lack of the necessary national legislation, does not relieve states and other international subjects (juristic persons) from their international obligation".[945] Furthermore, the solution to the comparative law challenge is not necessarily limited in introducing administrative or civil sanctions in the text of the Rome Statute, rather the solution may be sought from a swarm of contributing factors, for example: policy considerations.

The policy consideration factors include, firstly: it is submitted that, as a matter of policy consideration, prosecuting and punishing corporations for international crimes have an effect of enhancing the deterrence theory contemplated by the Rome Statute. Further, prosecuting corporations is one of the available effective and systematic methods of bringing an "*end to impunity*" for the perpetration on international crimes. By extension, the failure to cause corporations to account criminally, has the potential to incentivise the commission of core crimes by corporations.[946] The second policy factor lies in the "separate legal personality of corporations."[947] That is, a duly incorporated corporation is a real subject of law with full capacity,[948]the right to conduct business from which the corporation derives its benefits. It is therefore submitted that the assumption should be that if a person has rights, equally so, such a person must be imposed with duties that correspond with the rights. For instance, corporations has the right to conduct business for its benefits or profit, regrettably

[944] IT-95-14-T Judgment of 3 April 1996 Decision on the motion of the defence filed pursuant to Rule 64 of the rules of procedure and evidence.
[945] *Prosecutor v Tihofil Blaskic* IT-95-14-T Judgment of 3 April 1996 para 7.
[946] Amann (2001) *HICLR* 331.
[947] See, *Salmon* case for further reading on legal personality.
[948] Goulding *Company Law* 40 argues that "[o]nce registered in a manner required by law, a company forms a new legal entity separate from the shareholders, even where there is only a bare compliance with the provisions of the Act and where the overwhelming majority of the issued shares are held by one person."

these corporations in pursuit of maximising their benefits are not immunised against abuse of their powers, including commission or participation in the commission of crimes. Therefore, these unlimited powers without correctional measures enjoyed by corporations must be challenged.[949]

Thirdly, it is undeniable that corporations of nowadays are institutions that are much organised when compared to ancient corporations.[950] For instance, ancient corporations could not act nor make a decision. Currently, the position is that corporations are capable of formulating policies, taking rational decisions[951] and implement these decisions (policies) in the interests of the corporation, contrast to direct interest of the employees of such corporations. As a result, punishing an employee for the conduct from which he or she did not derive pleasure or benefit[952] is unfair and prejudicial. Thus, it is submitted that to correct this ill-conceived legal position and prejudice ascribed on the employee – the assumption should be that punishment must be made against the persons who benefited or obtained pleasure from the criminal conduct, in this regard, the corporation itself.

7 8 Concluding remarks

This chapter contains the summary of this dissertation, reflecting on the lessons that may be derived from the IMT, NMTs, the Rome Conference and the Kampala Review Conference as well as the practices from domestic courts on criminal responsibility of body corporates. It further provided a number of submissions, ranging from jurisprudential disconnect that exists between the domestic courts and the ICC; submission on why it is crucial to recognize juristic persons as subjects at international level and for purposes of corporate responsibility;

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[949] Davies *Company Law* 153 posits that the concept of capacity when applied in the context of companies can be traced back to the 19th century when the concept of a 'company's legal capacity' was developed by the courts; more specifically, the company's capacity to act was limited by its objects. The practice was that a company was required by legislation to include a statement of its objects in its memorandum of association; hence, companies were not allowed to act outside their objects.

[950] See, Chap1 of this dissertation above.

[951] Fisse & Braithwaite *Corporations* 102.

[952] Cavanaugh (2011) *JCL* 415.

submission on the need to close the corporate governance gap through the instrumentality of international criminal law – with special emphasis on the object "to put an end to impunity for the perpetrators of international crimes"[953] with focus on corporations.

It is without doubt that modern corporations are at law recognized as juristic persons with capacity to act and their acts may extend beyond the territory of a single country. They may be economically powerful to an extent that they can influence government policies, including bringing wealthy through foreign direct investment and improve people's lives. However, some of the corporate conduct may constitute serious violations (international crimes), therefore, to effectively deter corporations from committing crimes, this dissertation made a submission on amending the Rome Statute. The contemplated amendment, *inter alia*, include provisions related to temporal jurisdiction of the ICC, incorporation of article 25 *bis* that deals with corporate criminal responsibility and incorporation of article 77 *bis* to provide for penalties applicable to corporations.

In sum, it is was noted that the principle of corporate criminal responsibility appears to progressively develop at domestic level[954] contrary to international criminal law level. This lack of development at international level depicts, among others, the lack of political will by the international community. This dissertation has demonstrated that the adoption of corporate criminal responsibility by the ICC, is a realistic opportunity that may effectively thwart impunity for atrocity crimes committed by corporations. To buttress this submission and as it was elucidated in the preceding chapters, Stewart argues that the significance of corporate criminal liability include its expressive function – here, corporate criminal liability is construed as an effective "vehicle for communicating moral blame for corporate participation in atrocities."[955]This expressive function renders corporate criminal liability to be a preferable model of liability in contrast to civil liability.

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[953] See, preamble of the Rome Statute.
[954] Haigh (2008) *Australian Journal of Human Rights* 205.
[955] Stewart "Towards synergies in forms of corporate accountability for international crimes" 3.

The expressive (punitive) nature of corporate criminal liability, as was extensively discussed in chapters 4, 5 and 6 above, includes the stigma that it presents on convicted corporations. Further, as was demonstrated above, the pro-corporate criminal liability scholars are in agreement that the imposition of criminal sanctions does not openly allow corporations to engross the cost by passing same to innocent consumers through commodity or service elevated prices.[956] Finally, this dissertation demonstrated that both corporate criminal liability, individual criminal responsibility and civil liability can co-exist in pursuit of an effective solution to corporate accountability for international crimes.

[956] Stewart "Towards synergies in forms of corporate accountability for international crimes" 4.

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